IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD J. BEARDSLEE, Petitioner-Appellant v. JEANNE S. WOODFORD, Director of the Department of Corrections, JILL L. BROWN, Warden And Does 1-50 Respondents-Appellee	CA # 05-15042 DC # C 04-5381 JF

APPELLANT'S EXCERPTS OF RECORD (vol. 3)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE JEREMY FOGEL
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DONALD J. BEARDSLEE, Plaintiff, v. **JEANNE WOODFORD, Director and JILL BROWN, Warden,** Defendants.	**CAPITAL CASE** C 04-5381 JF

EXHIBITS IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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EXHIBIT 1

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NOT FOR CITATION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

KEVIN COOPER, Plaintiff, v. RICHARD A. RIMMER, Acting Director of the California Department of Corrections, and JEANNE S. WOODFORD, Warden of California State Prison at San Quentin, Defendants.	Case Number C 04 436 JF DEATH PENALTY CASE ORDER DENYING MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND FOR EXPEDITED DISCOVERY [Docket Nos. 3 & 6]

Plaintiff Kevin Cooper moves for a temporary restraining order or preliminary injunction and for expedited discovery. Defendants Richard A. Rimmer, Acting Director of the California Department of Corrections, and Jeanne S. Woodford, Warden of California State Prison at San Quentin, oppose the motions. The Court has read the moving and responding papers and has considered the oral arguments of counsel presented on Thursday, February 5, 2004. For the reasons set forth below, the motions will be denied.

I. BACKGROUND

Plaintiff has been sentenced to death. He is scheduled to be executed by lethal injection just after midnight on Tuesday, February 10, 2004. On Monday, February 2, 2004, Plaintiff filed the present action pursuant to 42 U.S.C. § 1983 (2004). Plaintiff seeks injunctive relief to

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prevent Defendants from executing him pursuant to California's lethal injection protocol because he contends that lethal injunction performed pursuant to that protocol inflicts unnecessary pain and torture in violation of his Eighth Amendment right to be free from cruel and unusual punishment.

II. LEGAL STANDARD

As a general rule, a party seeking a preliminary injunction must show either (1) a likelihood of success on the merits and the possibility of irreparable injury or (2) the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor. See Roe v. Anderson, 134 F.3d 1400, 1401-02 (9th Cir. 1998); Apple Computer, Inc. v. Formula Int'l, Inc., 725 F.2d 521, 523 (9th Cir. 1984). These formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. See Roe, 134 F.3d at 1402.

III. DISCUSSION

A. Jurisdiction

Defendants contend that Plaintiff should have filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (2004) rather than a civil rights action pursuant to 42 U.S.C. § 1983 (2004) to challenge California's lethal injection protocol. The question as to which of these statutes provides the proper means for raising a challenge to a method of execution presently is before the United States Supreme Court in Nelson v. Campbell, cert. granted, 124 S.Ct. 835 (2003). However, the United States Court of Appeals for the Ninth Circuit, whose precedent is controlling in this case pending the decision in Nelson, has held that "a challenge to a method of execution may be brought as a § 1983 action." Fierro v. Gomez, 77 F.3d 301, 305-06 (9th Cir.), vacated on other grounds, 519 U.S. 918 (1996). Accordingly, this Court has jurisdiction over Plaintiff's claims pursuant to § 1983.

B. Undue Delay

Although Plaintiff has been seeking review of his conviction and death sentence in state and federal courts for more than a decade, he filed the instant challenge to California's lethal

injection method of execution only eight days prior to his scheduled execution date. Plaintiff's explanation for the delay, which includes alleged failures in representation by prior counsel, difficulty in securing appointment of new counsel, new counsel's competing responsibilities in preparing a clemency petition and conducting investigations, and an alleged ripeness bar to an earlier presentation of his claims, does not establish cause under applicable law for his failure to raise this challenge at an earlier time. See Gomez v. U.S. Dist. Ct. N.D. Cal., 503 U.S. 653, 653-54 (1992) (holding that a court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief).

Although the Court does not doubt the truth of new counsel's representations, it is evident that Plaintiff, who has been and is being assisted by a number of different lawyers and legal organizations, had sufficient legal resources to bring the present action sooner. In the last month alone, the United States Supreme Court has declined to grant or has vacated stays granted to death row inmates filing last-minute challenges to lethal injection. See, e.g., Vickers v. Johnson, No. 03A633, 2004 WL 168080 (U.S. Jan. 28, 2004) (stay of execution denied); Zimmerman v. Johnson, No. 03A606, 2004 WL 97434 (U.S. Jan. 21, 2004) (same); Beck v. Rowsey, 124 S.Ct. 980 (Jan. 8, 2004) (stay of execution vacated). Absent a compelling justification for bringing this action at the eleventh hour, such as a material change in the applicable law or factual circumstances or an exceptionally strong showing on the merits, this Court may not simply ignore such clear guidance from the Supreme Court. Moreover, such challenges inappropriately force the Court to make an otherwise unnecessary choice between orderly consideration of the plaintiff's claims and "the state's interest in the finality of convictions that have survived direct review in the state court system." See Calderon v. Thompson, 523 U.S. 538, 555 (1998).[1]

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[1]While the stated objective of the present action is to address alleged deficiencies in California's lethal injection protocol, the timing of its filing reasonably suggests that an equally important purpose of the action is to stay Plaintiff's execution so that Plaintiff may continue to pursue claims going to the validity of his conviction.

C. Merits

The Eighth Amendment prohibits punishments involving "unnecessary and wanton infliction of pain," Estelle v. Gamble, 429 U.S. 97, 103 (1976) (internal quotation marks and citations omitted), or that are inconsistent with "evolving standards of decency that mark the progress of a maturing society," id. at 102 (internal quotation marks and citations omitted). Punishments involving "torture or a lingering death" violate the Eighth Amendment, In re Kemmler, 136 U.S. 436 (1890), and when analyzing a particular method of execution, it is appropriate to focus "on the objective evidence of the pain involved," Fierro, 77 F.3d at 306 (citing Campbell v. Wood, 18 F.3d 662, 682 (9th Cir.), cert. denied, 511 U.S. 1119 (1994) (concluding that hanging, when conducted under the state of Washington's protocol, did not constitute cruel and unusual punishment)).

Plaintiff maintains that the three-drug protocol[2] used for executions in California will subject him to an unreasonable risk of unnecessary pain. Specifically, Plaintiff alleges that the use of the paralytic agent pancuronium bromide (the second drug administered, also known as Pavulon) is inhumane. According to Plaintiff and his experts, Pavulon prevents movement and thus prevents observers from knowing whether the condemned person is experiencing great pain. Plaintiff also alleges that the anesthesia used in execution, sodium pentothal, is short-acting and unreliable. Finally, Plaintiff alleges that the protocol as a whole is vague and without adequate safeguards, pointing to previous executions in which prisoners may have died a painful death.

Even if Plaintiff's delay in bringing this action were to be ignored or excused, this Court would find and conclude that Plaintiff has not met his burden of demonstrating either the likelihood of success on the merits or the existence of serious questions going to the merits. While thirty-seven states and the federal government authorize lethal injection as a method of execution, not a single court has held that lethal injection violates the Eighth Amendment. To

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[2]Stated simply, the protocol involves the administration of an anesthetic intended to render the prisoner unconscious, followed by a paralytic to prevent involuntary movement, followed by potassium chloride, which stops the prisoner's heart.

the contrary, every state and federal court that has considered the issue has concluded that lethal injection is constitutional. See, e.g., LaGrand v. Lewis, 883 F. Supp. 469, 470-71 (D. Ariz. 1995) (citing cases), aff'd, 133 F.3d 1253 (9th Cir.), cert. denied, 525 U.S. 971 (1998); People v. Snow, 65 P.3d 749, 800-01 (Cal.), cert. denied, 1245 S.Ct. 922 (2003); Poland v. Stewart, 117 F.3d 1094, 1105 (9th Cir. 1997), cert. denied, 523 U.S. 1082 (1998) (finding petitioner had failed to demonstrate that Arizona's lethal injection protocol would violate his constitutional rights).[3]

Further, at least two courts that have examined lethal injection protocols that, like California's, include the use of both sodium pentothal and Pavulon have held on a fully-developed record that such protocols are constitutional. See State v. Webb, 750 A.2d 448, 453-57 (Conn.), cert. denied, 521 U.S. 835 (2000); Sims v. State, 754 So.2d 657 (Fla.), cert. denied, 528 U.S. 1183 (2000). Defendants' expert also has declared that in light of the large dose of sodium pentothal administered pursuant to California's protocol there is only "approximately a 0.00006% probability that [a] condemned inmate given [the dose] would be conscious, and able to experience pain, after a period of five minutes." Defs' Ex. C at 3.

Nor has Plaintiff met his burden of showing that the use of Pavulon is inhumane and unnecessary. According to Defendants and their experts, a principal purpose of Pavulon is to stop an inmate's breathing. Plaintiff has not articulated a compelling argument that this is not a legitimate state interest in the context of an execution.

Finally, Plaintiff's argument that the lethal injection protocol used in California is unconstitutionally vague does not present a serious question going to the merits. "Written procedures are not constitutionally infirm simply because they fail to specify in explicit detail the execution protocol." LaGrand, 883 F.Supp. at 470.

While opponents of the death penalty understandably argue that no method of execution can be humane, there is ample legal authority that lethal injection also "comports with current societal norms" regarding execution. Id. at 471. As noted, virtually all states and the federal

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[3]See also Defs.' Opp'n App. T.R.O. at 13, n.8, and cases cited therein.

government utilize lethal injection as a means of execution. Legislative trends towards imposing a particular punishment are relevant evidence of whether a punishment is cruel and unusual. Fierro, 77 F.3d at 306 n.4 (citing Trop v. Dulles, 356 U.S. 86, 102 (1958) (plurality opinion)).

In sum, Plaintiff has done no more than raise the possibility that California's lethal-injection protocol unnecessarily risks an unconstitutional level of pain and suffering. As he has neither demonstrated the likelihood of success on the merits nor serious questions going to the merits, he is not entitled to injunctive relief.[4]

IV. DISPOSITION

Any case involving the death penalty inevitably raises serious moral, ethical, and legal questions about which people of good will continue to disagree. In Plaintiff's case there also appear to be questions concerning the underlying conviction that have been and continue to be the subject of impassioned debate. The present case, however, concerns the discrete question of whether Plaintiff has met the legal standard for enjoining California's use of lethal injection as a method of execution. Because the Court finds and concludes that Plaintiff has not met this standard and has delayed unduly in asserting his claims, and good cause therefor appearing, IT IS HEREBY ORDERED:

(1) Plaintiff's motion for a temporary restraining order or preliminary injunction is DENIED;

(2) Plaintiff's motion for expedited discovery is DENIED as moot.

DATED: February 6, 2004

/s/ (electronic signature authorized)
JEREMY FOGEL
United States District Judge

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[4]Given the stark finality of the death penalty, there can be no question that Plaintiff will suffer irreparable injury in the absence of injunctive relief. However, in the Ninth Circuit, "even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits." Johnson v. California State Bd. Of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995).

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EXHIBIT 2

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IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

In re	)	Crim No. 23593;
	)	Automatic Appeal No. S004609
DONALD J. BEARDSLEE	)	Ancillary Habeas No. S004622
	)	
On Habeas Corpus	)	DEATH PENALTY CASE
	)	

PETITION FOR WRIT OF HABEAS CORPUS

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On Behalf of Petitioner
Donald J. Beardslee

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TWENTY-SEVENTH CLAIM FOR RELIEF

The Use of Lethal Gas as a Method of Execution Constitutes Cruel and Unusual Punishment in Violation of Petitioner's Eighth and Fourteenth Amendment Rights.

183. Petitioner incorporates and realleges the allegations of Paragraphs 1-254.[104]

184. Petitioner's sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because California's option of execution by lethal gas constitutes cruel and unusual punishment.

185. Petitioner alleges the following facts, among others to be presented after full investigation, discovery and evidentiary hearing, in support of this claim:

a. California Penal Code §§3604(a) and (b) provide, in relevant part, that:

> The punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death . . . If a person under sentence of death does not choose either lethal gas or lethal injection, . . . the penalty of death shall be imposed by lethal gas.

b. Petitioner was expressly sentenced to die by means of lethal gas.

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[104] Petitioner recognizes that Judge Patel of the Federal District Court for the Northern District of California has already ruled that death by lethal gas is unconstitutional. Petitioner understands that this ruling has been recently affirmed by the Ninth Circuit Court of Appeals. However, Petitioner is also informed and believes that the State is appealing the Ninth Circuit's decision. Therefore, this claim is raised in an abundance of caution in order to exhaust all claims and pursuant to the requirements of McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454 (1991).

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c. The use of lethal gas is unusual in that, for over a decade no state has adopted the lethal gas method and in the past fifteen years at least eight states have abandoned the use of gas as a means for execution.

d. The use of lethal gas as a means of execution is cruel and offends the dignity of every human being. Death by cyanide gas as administered in California occurs by gradual asphyxiation of the prisoner and involves protracted and extreme physical pain over a span of ten to twelve minutes. During this time cyanide pellets dropped into a bath of sulfuric acid produce the lethal gas, which mixes with the nontoxic air in the death chamber. As the condemned prisoner breathes, gradually increasing amounts of lethal gas are inhaled and begin to destroy his or her lungs. During this process, the prisoner begins to suffocate, triggering a reaction of panic, terror and a claustrophobic sensation as the prisoner attempts simultaneously to avoid breathing the poisonous fumes while seeking to breathe fresh air. The ensuing feeling of suffocation and the grip of the straps holding the prisoner's body in the death chair causes the condemned prisoner to thrash hysterically against the restraints. While still conscious and enduring the burning of cyanide gas in his or her lungs, the prisoner loses control of bodily functions, often urinating, defecating and vomiting. The grotesque, inhumane and horrifying suffering inflicted on a person through execution by lethal gas is so shocking to the conscience and dignity of civilized society that the

state consistently resists permitting juries and the public at large from receiving such information. Evidence of the details of an execution is judicially recognized as likely to prevent a jury from imposing death irrespective of the gravity of the crime. People v. Thompson, 45 Cal.3d 86, 139, 246 Cal.Rptr. 245, cert. denied sub nom Thompson v. California, 488 U.S. 960, 109 S.Ct. 404 (1988).

e. The Eighth Amendment prohibits punishments that involve torture, a lingering death, or the unnecessary and wanton infliction of pain and that are unusual because of their infrequent use. Death by lethal gas is such a punishment.

f. Subjecting Petitioner to death by lethal injection also constitutes cruel and unusual punishment violative of his Eighth and Fourteenth Amendment rights.[105] This claim is presented to this Court without substantial delay and is timely for the reasons set forth in Section V.A. of this Petition, supra. Even if this Court is inclined to rule that the claim is untimely, this Court should still reach the merits of the claim for the reasons set forth in Sections V.B. and V.C. of this Petition, supra.

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[105] Petitioner acknowledges that this claim appears not to have a valid legal basis under existing case law but would be validated by changes in existing law that Petitioner feels are warranted. This claim is raised pursuant to the requirements of McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454 (1991).

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EXHIBIT 3

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On Behalf of Petitioner Donald J. Beardslee

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DONALD J. BEARDSLEE,

Petitioner,

v.

ARTHUR CALDERON, Warden of the California State Prison at San Quentin,

Respondent.

Case No. C-92-3990-SBA

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

DEATH PENALTY CASE

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408. The trial court's instruction to the jury to reach a separate penalty verdict as to each of the two murder counts had a substantial and injurious effect or influence in determining the jury's verdict and rendered the penalty phase of Petitioner's trial unfair and the trial process unreliable. Accordingly, Petitioner's sentence must be overturned and he must be retried.

FIFTY-FIRST CLAIM FOR RELIEF

The Use of Lethal Gas as a Method of Execution Constitutes Cruel and Unusual Punishment in Violation of Petitioner's Eighth and Fourteenth Amendment Rights.

409. Petitioner incorporates and realleges the allegations of Paragraphs 1-490.[183]

410. Petitioner's sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because California's option of execution by lethal gas constitutes cruel and unusual punishment.

411. Petitioner alleges the following facts, among others to be presented after full investigation, discovery and evidentiary hearing, in support of this claim:

a. California Penal Code §§3604(a) and (b) provide, in relevant part, that:

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[183] Petitioner recognizes that Judge Patel of the Federal District Court for the Northern District of California has already ruled that death by lethal gas is unconstitutional. Petitioner understands that this ruling has been recently affirmed by the Ninth Circuit Court of Appeals. However, Petitioner is also informed and believes that the State is appealing the Ninth Circuit's decision. Therefore, this claim is raised in an abundance of caution in order to exhaust all claims and pursuant to the requirements of McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454 (1991).

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> The punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death . . . If a person under sentence of death does not choose either lethal gas or lethal injection, . . . the penalty of death shall be imposed by lethal gas.

b. Petitioner was expressly sentenced to die by means of lethal gas.

c. The use of lethal gas is unusual in that, for over a decade no state has adopted the lethal gas method and in the past fifteen years at least eight states have abandoned the use of gas as a means for execution.

d. The use of lethal gas as a means of execution is cruel and offends the dignity of every human being. Death by cyanide gas as administered in California occurs by gradual asphyxiation of the prisoner and involves protracted and extreme physical pain over a span of ten to twelve minutes. During this time cyanide pellets dropped into a bath of sulfuric acid produce the lethal gas, which mixes with the nontoxic air in the death chamber. As the condemned prisoner breathes, gradually increasing amounts of lethal gas are inhaled and begin to destroy his or her lungs. During this process, the prisoner begins to suffocate, triggering a reaction of panic, terror and a claustrophobic sensation as the prisoner attempts simultaneously to avoid breathing the poisonous fumes while seeking to breathe fresh air. The ensuing feeling of suffocation and the grip of the straps holding the prisoner's body in the death chair causes the condemned prisoner to thrash hysterically against the restraints. While still conscious and enduring the burning of

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cyanide gas in his or her lungs, the prisoner loses control of bodily functions, often urinating, defecating and vomiting. The grotesque, inhumane and horrifying suffering inflicted on a person through execution by lethal gas is so shocking to the conscience and dignity of civilized society that the state consistently resists permitting juries and the public at large from receiving such information. Evidence of the details of an execution is judicially recognized as likely to prevent a jury from imposing death irrespective of the gravity of the crime. People v. Thompson, 45 Cal.3d 86, 139, 246 Cal.Rptr. 245, cert. denied sub nom Thompson v. California, 488 U.S. 960, 109 S.Ct. 404 (1988).

e. The Eighth Amendment prohibits punishments that involve torture, a lingering death, or the unnecessary and wanton infliction of pain and that are unusual because of their infrequent use. Death by lethal gas is such a punishment.

f. Subjecting Petitioner to death by lethal injection also constitutes cruel and unusual punishment violative of his Eighth and Fourteenth Amendment rights.[184]

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[184] Petitioner acknowledges that this claim appears not to have a valid legal basis under existing case law but would be validated by changes in existing law that Petitioner feels are warranted. This claim is raised pursuant to the requirements of McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454 (1991).

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EXHIBIT 4

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

DONALD J. BEARDSLEE,

Petitioner,

v.

ARTHUR CALDERON, Warden,

Respondent.

NO. C-92-3990-SBA

ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

On September 9, 1999, the Court conducted a hearing on Respondent's motion for summary judgment as to Claims 24-29, 31-32, 35-39, 41- 44, 47, 51-55, 57-58, 60-64 and 66. These are the claims as to which no evidentiary hearing has been requested by Petitioner and which have not been previously dismissed by the Court. With these claims now resolved, the Court will determine which claims, if any, of remaining Claims 2-14, 16-22, 40, 48-49 and 67 require an evidentiary hearing.

Attorneys Brett Raven and Steven S. Lubliner appeared on behalf of Petitioner and Deputy Attorney General Dane R. Gillette appeared on behalf of Respondent. Based on all papers filed to date, as well as on the oral argument of counsel, the Court finds and orders as follows.

which were given in his case, resulting in disparate sentences amongst the defendants and permitting all other defendants to escape a death sentence. No explanation is offered for these differences by Petitioner nor does he allege that varying charges were brought against the co-defendants or that the trials were conducted in any improper manner. Therefore, the allegations raised by Petitioner do not seem to the Court to support his claim that the court system itself it somehow deficient.

In any event, in examining Petitioner's case, the Court must review the record and determine whether or not, based on all of the evidence submitted and the jury instructions which were given, Petitioner received a fundamentally fair trial. See Estelle v. McGuire, 502 U.S. 62, 71-72 (1991). The Court has conducted such an analysis and has concluded that Petitioner's constitutional rights were afforded him. Therefore, the Court grants Respondent's motion for summary judgment as to Claim 44.

2. Claim 51: Lethal Gas Constitutes Cruel and Unusual Punishment

Petitioner's fifty-first claim alleges that the method of execution by use of lethal gas constitutes cruel and unusual punishment. California law permits execution by lethal gas or lethal injection. To implement lethal injections, California issued new regulations limiting witness observation of the execution. See California First Amendment Coalition v. Calderon, 150 F.3d 976, 979 (9th Cir. 1998). These regulations have not been shown to be an exaggerated response to prison security and staff safety and therefore have not been shown to violate the First Amendment rights of either the press or the public to view executions. See id. at 7879.

California was enjoined from using lethal gas as a method of execution for a short while, see Fierro v. Gomez, 77 F.3d 301 (9th Cir.), vacated on other grounds, 117 S. Ct. 285 (1996), but that injunction was ordered vacated due to a change in California law. See Fierro v. Terhune, 147 F.3d 1158, 1160 (9th Cir. 1998). The

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voluntary choice of lethal gas as a method of execution waives any claim that the use of lethal gas is unconstitutional. See Stewart v. LaGrand, 119 S. Ct. 1018, 1020 (1999) ("To hold otherwise, and to hold that Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule in violation of Teague v. Lane, 489 U.S. 288 (1989)."). Accordingly, Petitioner may choose to be executed by lethal gas or lethal injection. If he fails to make a choice, he will be executed by lethal injection. If he chooses to be executed by lethal gas, then his claim that such execution method constitutes cruel and unusual punishment is waived. Stewart at 1020.

IV. CONCLUSION

For the reasons set forth herein, the Court grants Respondent's motion for summary judgment as to Claims 24-29, 31-32, 35-39, 41-44, 47, 51-55, 57-58, 60-64 and 66. The Court will next determine which claims, if any, of remaining Claims 2-14, 16-22, 40, 48-49 and 67 require an evidentiary hearing. Petitioner's request for an evidentiary hearing as to these claims shall be heard by the Court on October 26, 1999 at 10:30 a.m.

DATED: Sept 21, 1999

Saundra B Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

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EXHIBIT 5

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Attorneys for Plaintiff Kevin Cooper

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KEVIN COOPER,

Plaintiff,

v.

RICHARD A. RIMMER, Acting Director of the California Department of Corrections; JEANNE WOODFORD, Warden, San Quentin State Prison, San Quentin, California,

Defendants.

Case No. _____

COMPLAINT FOR EQUITABLE AND INJUNCTIVE RELIEF [42 U.S.C. § 1983]

EXECUTION IMMINENT
Execution Date February 10, 2004
EXPEDITED REVIEW REQUESTED*

The plaintiff, Kevin Cooper, alleges as follows:

NATURE OF ACTION

1. This action is brought pursuant to 42 U.S.C. Section 1983 for violations and threatened violations of the right of the plaintiff to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. Plaintiff seeks temporary, preliminary and permanent injunctive relief to prevent the defendants from executing plaintiff via means of lethal injection, as that method of execution currently is used in California. Plaintiff's contentions are that lethal injection, as performed in California, inflicts unnecessary

pain and torture through the use of a paralytic agent that acts as a chemical veil over the process, disguising the agony to be suffered by him. Plaintiff further contends that the absence of many standard medical procedures, and the use of un-approved, untested and unnecessarily risky procedures during lethal injection, so elevate the risk of pain and torture, and have actually inflicted such pain and torture in the past, that it is certain he will suffer the same fate unless and until California's Department of Corrections adopts a humane and safe execution protocol.

JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. Section 1331 (federal question jurisdiction), Section 1343 (civil rights violation), Section 2201 (declaratory relief), Section 2202 (further relief). This action arises under the Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. Section 1983.

3. Venue is proper pursuant to 28 U.S.C. Section 1391(b), in that the plaintiff is currently incarcerated in San Quentin State Prison in San Quentin, California, located in this District. All executions conducted by the State of California ("State") occur at San Quentin. As this complaint alleges causes of action related to such executions, the events giving rise to this complaint will occur in this District.

THE PARTIES

4. Plaintiff Kevin Cooper is a United States citizen and a resident of the State. He is currently a death-sentenced inmate under the supervision of the California Department of Corrections, C-65304. He is held in San Quentin State Prison, San Quentin, California 94974.

5. Defendant Richard A. Rimmer is the Acting Director of the California Department of Corrections.

6. Defendant Jeanne Woodford is the Warden of San Quentin State Prison where the plaintiff is incarcerated and where his execution is scheduled to occur.

GENERAL ALLEGATIONS

7. The State has scheduled execution for February 10, 2004. State officials have announced that they will commence with the execution at 12:01 a.m.

8. The State intends to execute plaintiff by poisoning him with a lethal com-

bination of three chemical substances: sodium pentothal (a short-acting barbiturate); pancuronium bromide (a curare-derived agent that paralyzes all skeletal or voluntary muscles, but which has no effect whatsoever on awareness, cognition, or sensation); and potassium chloride (an extraordinarily painful chemical that activates the nerve fibers lining the inmate's veins and which can interfere with the rhythmic contractions of the heart and cause cardiac arrest).

9. The California Department of Corrections ("CDC") protocol by which lethal injection executions are performed violates numerous constitutional and statutory provisions designed to prevent cruelty, pain and torture, and thus petitioner may not be executed under its current provisions.

10. The CDC adopted the present protocol without any of the standard and well-accepted medical research and review. The procedures are ad-hoc procedure cobbled together without any consultation, review or regular vetting, and with no assistance by the medical community. Unqualified and untrained personnel are determining the procedure based solely on a version initially adopted in Oklahoma, then applied somewhat differently in Texas, and only because a previous at Warden of San Quentin observed an execution in Texas, without any regular and appropriate input from or consultation with medical personnel. The result has been an increasingly dangerous procedure, with the last execution providing a graphic example of the results of this institutional neglect.

11. The particular combination of chemicals, and the absence of standardized procedures and qualifications of the personnel involved, will cause plaintiff consciously to suffer an excruciatingly painful and protracted death, as has happened to three of the four previous executions for which some records are available, and in the last execution of Stephen Anderson.

12. Sodium pentothal is an ultra-short-acting barbiturate that is ordinarily administered only during the induction phase of anesthesia, so that the patient may re-awaken and breathe unassisted if any complications arise. Because of its brief duration, there is a reasonable likelihood that sodium pentothal may not provide a sedative effect throughout the entire execution process. Without adequate sedation, plaintiff will experience excruciating pain during the execution process.

13. The second chemical involved in the lethal injection process, pancuronium bromide, is a derivative of curare that acts as a neuromuscular blocking agent. While pancuronium bromide paralyzes skeletal muscles, including the diaphragm, it has no effect on consciousness or the perception of pain and suffering. This paralytic chemical (pancuronium bromide) is completely unnecessary and serves only to mask the excruciating pain of the plaintiff.

14. The risk of inflicting severe and unnecessary pain and suffering upon plaintiff in the lethal injection process is particularly grave because California's procedures and protocols do not include medically-required and appropriate safeguards. There are no standardized time of administration requirements for each of the chemicals; the protocol does not contain safeguards regarding the manner in which the execution is to be carried out; it does not establish the minimum qualifications and expertise required of the personnel performing the critical tasks in the lethal injection procedure; and, there is no appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection procedures. The California protocol has no contingency plan in place if petitioner requires medical assistance, and actually contains provisions which will counteract the intended sedation.

COUNT I

VIOLATION OF RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT (EIGHTH AND FOURTEENTH AMENDMENTS)

(42 U.S.C. § 1983)

15. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 14.

16. Defendants Richard A. Rimmer and Jeanne Woodford are acting under color of California law or causing to be administered to plaintiff chemicals that will cause unnecessary pain in the execution of a sentence of death, thereby depriving plaintiff of his rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment, in violation of 42 U.S.C. Section 1983.

17. The California Department of Correction's lethal injection protocol violates plaintiff's rights under the cruel and unusual punishments Clause of the Eighth Amendment be-

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cause: (a) the protocol does not comport with contemporary norms and standards of society; (b) the protocol offends the dignity of the person and society; (c) the protocol creates the unreasonable and unacceptable risk of unnecessary physical pain; and (c) the protocol creates the unreasonable and unacceptable risk of unnecessary psychological pain.

18. The California lethal injection protocol utilizes three chemicals without any indications of proper training, experience or expertise on the part of those entrusted with the injection procedure. The procedure fails to detail any relative timing protocol for administration of the three chemicals, a necessary requirement for the effective administration of these chemicals.

19. The California lethal injection protocol's use of pancuronium bromide is completely unnecessary to execute plaintiff and there is a probability that the use of this chemical, when combined with the initial dose of sodium pentothal, will result in plaintiff being paralyzed but conscious and suffering from death by suffocation, or, worse, the sensations associated with the injection of potassium chloride: burning veins and heart failure. The sole purpose for the use of pancuronium is to impose a chemical camouflage on the process and thereby hide the pain and suffering by the inmate. For this very reason the use of pancuronium bromide has been banned in the euthanasia of animals.

20. The sedative agent utilized in the California procedure, sodium pentothal, is an ultra-fast acting barbiturate that must be carefully administered and monitored if it is to have the desired effect of rendering the inmate unconscious sufficiently to apply the remaining chemicals without causing extreme pain and suffering. The California procedure fails to apply proper administration and monitoring mechanisms to ensure this.

21. The California procedure fails to address the likely differences among the inmate population in body type, drug history, medical condition and history. Each of these differences must be considered when determining the propriety of the lethal injection procedure and its ability to adequately sedate plaintiff. None have been so considered. The California procedure allows the administration of Valium close in time to the execution, which will cause complications in the ability of the sedative agent to have the full and desired effect.

22. There is no adequate description of the training, credentials, certifications,

experience or proficiency of any prison employee, nurse or paramedic in the administration of the lethal injection procedure, an admittedly complex medical event that requires a great deal of care, training and expertise. For instance, there is nothing in the procedure that would require someone with sufficient expertise to determine if blockage is present in the intravenous line. If such a block is present, and is not attended to immediately and properly, plaintiff will experience the agony of death by conscious suffocation or the suffering associated with death by potassium chloride, both of which are extremely painful and inhumane.

23. The California procedure fails to address any reasonably foreseeable complications with any appropriate medical response. If California is using the "cut-down" procedure utilized by the states it emulates, that process requires a sufficient training and experience, and medical licensing, none of which are contained within California's protocols.

24. Plaintiff's contentions are supported by official Department of Corrections records. Of California's recorded lethal injections, at least three were such that it is probable that the inmates suffered an inhumane and excruciating death. In the case of Stephen Anderson's execution, the last one in California, observations were consistent with Mr. Anderson being insufficiently sedated and suffering unnecessarily and painfully.

COUNT II

VIOLATION OF RIGHT TO DUE PROCESS (FOURTEENTH AMENDMENT)

(42 U.S.C. § 1983)

25. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 24.

26. The CDC's lethal injection protocol violates plaintiff's rights under the due process clause of the Fourteenth Amendment of the United States Constitution, because the protocol was improperly formulated outside of the public's eye pursuant to arbitrary procedures, has never been reviewed by any legislative body or any public representative and calls for the arbitrary use of a neuromuscular blocking agent, pancuronium bromide (aka "Pavulon"), which serves no legitimate purpose and chemically veils the process.

27. The CDC's lethal injection protocol is illegal under applicable mandatory

administrative provisions contained in California statutes and regulations, and thereby violates plaintiff's fundamental constitutional rights and rights to due process of law under the Fourteenth Amendment for the following reasons:

(a) The lethal injection protocol was promulgated in violation of the California Administrative Procedures Act , made expressly applicable to the CDC pursuant to Penal Code Section 5058;

(b) The lethal injection protocol, in providing for the use of the neuromuscular blocking agent Pavulon, which is strictly prohibited for use in euthanizing non-livestock animals, violates California statutory and regulatory law prohibiting cruelty to animals, including Penal Code Sections 597 and 599b, Business and Professions Code Sections 4800-917 (the Veterinary Medicine Practice Act), Office of the Attorney General of the State of California, Opinion 01-103 (January 2, 2002) (adopting the 1993 Report of the American Veterinary Medical Association Panel of Euthanasia as the proper standard in California for measuring whether an animal euthanasia procedure causes "unnecessary or unjustifiable physical pain or suffering" within the meaning of section 599b);

(c) The lethal injection procedures, in providing for the practice of medicine and provision of healthcare services by unlicensed and uncertified persons, violates California's Medical Practice Act and the statutes and regulations governing the practice of such services in the state, and further violates the equal protection clauses of the state and federal constitutions by requiring absolutely no training for those who execute humans, but mandating rigorous training under Business and Professions Code Section 4827(d) and Section 2039 of Title 16 of the California Code of Regulations for those non-medical personnel who administer euthanasia to pets;

(d) The lethal injection procedures, in providing for the unregulated handling and administration of controlled substances, including sodium pentothal, a Schedule III controlled substance, violates the California Uniform Controlled Substances Act, and regulations promulgated thereunder.

28. Plaintiff has a liberty interest guaranteed by these provisions of California

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law and which is protected by the due process clause of the Fourteenth Amendment.

COUNT III

VIOLATION OF RIGHTS TO HAVE ACCESS TO THE COURTS AND OTHER REMEDIES TO PROTECT THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT (FIRST, EIGHTH AND FOURTEENTH AMENDMENTS)

(42 U.S.C. § 1983)

29. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 28.

30. The CDC's lethal injection protocol violates the plaintiff's rights protected under the First, Eighth and Fourteenth Amendments of the United States Constitution, to have access to the courts and other remedies to protect plaintiff's right not to be subjected to cruel and unusual punishment because the protocol requires the use of Pavulon, which creates a chemical veil over the execution.

31. The right to a public viewing of the execution so that it can be determined whether or not plaintiff suffered an inhumane execution is effectively masked by the unnecessary and inherently risky use of pancuronium bromide in the doses contained in California's protocol. This chemical veil is the equivalent of a curtain being placed over the execution chamber that eliminates review of the process and its effect.

32. Pancuronium paralyzes all voluntary muscles, but does not affect sensation, consciousness, cognition, or the ability to feel pain and suffocation. Pancuronium bromide is a neuromuscular blocking agent. Its effect is that it renders the muscles unable to contract but it does not affect the brain or the nerves. It is used in surgery to ensure that there is no movement and that the patient is securely paralyzed so that surgery can be performed without contraction of the muscles. There is no reason for the application of this drug other than to mask the effects of the other chemicals used in the injection process.

PRAYER FOR RELIEF

WHEREFORE, Kevin Cooper prays for:

1. Temporary, preliminary and permanent injunctive relief against the defendants, their officers, agents, servants, employees and all persons acting in concert with them, that

enjoins the defendants from executing plaintiff by lethal injection using the chemicals and under the procedures in effect;

2. Reasonable attorneys' fees pursuant to 42 U.S.C. Section 1983 and the laws of the United States;

3. Costs of suit; and

4. Any such other relief as the Court deems just and proper.

Dated: February 1, 2004.

GEORGE A. YUHAS
DAVID T. ALEXANDER
LISA MARIE SCHULL
ORRICK, HERRINGTON & SUTCLIFFE LLP

JOHN R. GRELE

By David T. Alexander
David T. Alexander
Attorneys for Plaintiff Kevin Cooper

VERIFICATION

I, David T. Alexander, hereby declare:

1. I am a member of the State Bar of the State of California and admitted to practice before all courts of this State. I am a partner with the law firm of Orrick, Herrington & Sutcliffe LLP, associate counsel for petitioner Kevin Cooper in this matter. I have personal knowledge of the matters set forth in this Complaint, except as otherwise indicated, and could and would competently testify to them if called upon to do so.

2. Mr. Cooper is in custody and restrained of his liberty in a county other than where my office is situated. For this reason, I am making this verification on his behalf.

3. I have reviewed the foregoing Complaint for Equitable and Injunctive Relief. I verify that all of the alleged facts that are not otherwise supported by citations to the records or declarations to the attached petition are true and correct to my own knowledge, except as to the matters stated in it on information and belief, which I am informed and believe are true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing statements are true and correct and that this declaration was executed on February 2, 2004 at San Francisco, California.

David T. Alexander

David T. Alexander

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KEVIN COOPER,

Plaintiff,

v.

RICHARD A. RIMMER, Acting Director of the California Department of Corrections; JEANNE WOODFORD, Warden, San Quentin State Prison, San Quentin, California,

Defendants.

Case No. _____

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER; PRELIMINARY INJUNCTION AN ORDER TO SHOW CAUSE ORDER TO SHOW CAUSE; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

EXECUTION IMMINENT:
Execution Date February 10, 2004

EXPEDITED REVIEW REQUESTED

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NOTICE OF APPLICATION AND APPLICATION

Plaintiff Kevin Cooper, through his counsel of record, seeks temporary and preliminary injunctive relief pending the resolution of this action to prevent defendants Richard A. Rimmer, Acting Director of the California Department of Corrections and Jeanne Woodford, Warden, San Quentin State Prison, San Quentin, California from executing plaintiff by means of lethal injection as it is currently carried out in California. Plaintiff requests that the Court issue an order to show cause and a briefing schedule so that the hearing on the matter shall occur no later than Wednesday, February 4, 2004, or as soon thereafter as the Court may set given the need for expedited resolution of this matter with adequate time for appeal before February 10, 2004.

This application for a temporary restraining order is made pursuant to Federal Rules of Civil Procedure 65 and Civil Local Rule 65-1, and is brought on the grounds that plaintiff will sustain serious and irreparable harm if injunctive relief is not immediately granted prohibiting the defendants from conducting plaintiff's execution in accordance with Procedure No. 770. Plaintiff is likely to prevail on the merits of the underlying action and the balance of hardships tips decidedly in plaintiff's favor. This application is based on the verified complaint, the following memorandum of points and authorities and the declarations of John R. Grele, Dr. Cory Weinstein and Dr. Mark Heath submitted herewith, as well as such evidence as may be presented to the Court on the hearing of this motion.

Pursuant to Federal Rule of Civil Procedure 65(b), the complaint and *ex parte* papers have been provided to opposing counsel.

I. INTRODUCTION

On February 10, 2004, Kevin Cooper, a death row inmate in San Quentin State Prison, is scheduled to die by lethal injection. As new information surrounding the lethal injection procedure as it is employed in California becomes increasingly available, it has become clear that the method used in California violates both the Eighth and Fourteenth Amendments to the United States Constitution.

In 1992, the State of California adopted lethal injection as a more humane alternative to lethal gas executions. In designing protocols for the new execution method, officials from

the Department of Corrections consulted with other prison officials to create Procedure No. 770, the guideline governing lethal injection executions in California. The California lethal injection procedure utilizes a combination of a barbiturate sedative (sodium pentothal), a neuromuscular blocking agent (pancuronium bromide), and a chemical that stops the heart (potassium chloride). In their haste to create these procedures, however, state officials neglected to consult with medical professionals to ensure that the adopted process ensures a humane method of enforcing California's capital sentencing scheme.

As standards of decency evolve and medical information becomes available, the inhumanity of lethal injection, as it is carried out in California, is not in question. In at least three of the eight lethal injection executions, state officials failed to follow their protocol, resulting in excruciating pain for the condemned inmates. The descriptions and reports of the Bonin, Siripongs and Anderson executions all contain details of behaviors and responses consistent with inadequate sedation and excruciating pain. In particular, the Anderson execution was occasioned by over thirty (30) heaves and pauses and visible evidence that Anderson suffered an agonizing death. Moreover, recent events and the greater availability of medical information as more lethal injection executions take place throughout the country reveal that even when the protocol is followed correctly, the person to be executed is paralyzed, but experiences extreme and unnecessary pain for several minutes. Indeed, although proponents of lethal injection in California have found comfort in the fact that the inmates appear calm and serene during the process, this serenity is actually the result of a chemical veil created by the muscle paralysis, not the absence of excruciating pain.

The recent medical controversy surrounding lethal injection executions in other states has given rise to a closer analysis of the process and substances used by the State of California. This inquiry, as documented by the exhibits filed in support of this application, demonstrates the significant likelihood that Mr. Cooper will experience excruciating pain during his execution. Mr. Cooper thus requests that the Court issue an order enjoining execution by means of lethal injection as it is currently administered in the State of California, and staying Mr. Coo-

per's currently scheduled execution until a more humane method is implemented.[1]

II. FACTUAL BACKGROUND

On February 19, 1985, a jury in San Diego County found Kevin Cooper ("Mr. Cooper") guilty of four counts of First Degree Murder (Cal. Penal Code § 187; Counts 2, 3, 4 and 5) and one count of Attempted First Degree Murder (Cal. Penal Code §§ 664, 187; Count 6). The jury also found that the crimes were committed under special circumstances in that Mr. Cooper committed more than one murder and he inflicted great bodily injury. Cal. Penal Code § 190.2(a)(3), 12022.7. On March 1, 1985, the jury returned a finding that Cooper should suffer the penalty of death for these crimes.

On December 17, 2003, the Superior Court of San Diego issued a death warrant under California Penal Code section 1227. The court ordered Cooper to "suffer the death penalty, and that said penalty shall be inflicted within the walls of the State Prison at San Quentin, California, in the manner and means prescribed by law." The court set Mr. Cooper's execution date for February 10, 2004. Mr. Cooper has declined to elect a form of execution. Thus, under the procedures of this State, Mr. Cooper is scheduled to die by means of lethal injection. Cal. Penal Code § 36034; *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994), *aff'd, Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), *reversed on other grounds, Gomez v. Fierro*, 519 U.S. 918 (1996).

Unless executive clemency or a stay of execution is issued, Mr. Cooper's execution will be conducted under the authority of San Quentin Operational Procedure No. 770 ("Procedure No. 770"), the protocol that sets forth the "procedure for the care and treatment of inmates from

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[1] The United States Supreme Court recently granted certiorari to address a challenge to Alabama's lethal injection procedures. Condemned inmate David Larry Nelson ("Nelson") brought an action under 42 U.S.C. Section 1983 challenging Alabama's intention to use a cut-down procedure to gain venous access under the Eighth Amendment.

On December 1, 2003, the Supreme Court stayed Nelson's execution and granted his petition for a writ of certiorari on the following question: "[w]hether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?" *Nelson v. Campbell*, 2003 U.S. LEXIS 8577 (2003).

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the time an execution date is set through execution by lethal injection."[2] (Declaration of John R. Grele in support hereof ["Grele Decl."] ¶ 2, Ex. A, Section II.) The lethal injection procedure is summarized on the California Department of Corrections website at ttp://www.cdc.state.ca.us/issues/capital/capital4.htm (the "Lethal Injection Website"). (Grele Decl. ¶ 5, Ex. D.) Procedure No. 770 and the Lethal Injection Website contain the only official guidelines for the prison Warden and execution team in carrying out Mr. Cooper's execution.

III. ARGUMENT

A. Defendants' Conduct Is Actionable Under Section 1983

1. A Challenge to a Method of Execution Is Properly Brought as a Section 1983 Claim

In this circuit, challenges to a method of execution are properly considered as section 1983 claims. *Fierro v. Gomez*, 77 F.3d 301, 306 (9th Cir. 1996), *opinion vacated on other grounds*, 519 U.S. 918 (1996). The State of California in *Fierro* argued that challenges to a method of execution could only be brought through a petition for writ of habeas corpus. *Id.* at 302. As explained by this Court, a petition for writ of habeas corpus properly involves a challenge by an inmate to the constitutionality of his conviction or sentence. *Id.* at 304 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973)). A challenge to a means of execution, however, seeks a review of the method by which sentences are carried out, rather than a review of the actual death sentence itself. *Fierro* at 304. Accordingly, "a challenge to the method by which an inmate sentenced to death will be executed may be brought pursuant to § 1983." *Id.* at 306.

2. 42 U.S.C. Section 1983 Provides Redress for Violations of the Eighth and Fourteenth Amendments

42 U.S.C. section 1983 provides, in relevant part, for the protection of "any rights, privileges, or immunities secured by the Constitution and laws" against infringement by the

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[2] Mr. Cooper has obtained a redacted copy of Procedure No. 770. This memorandum addresses only the deficiencies in Procedure No. 770 as observed from the partial copy available to Mr. Cooper. Mr. Cooper is filing herewith a request for production of documents and things and a notice of deposition in order to obtain information, including a complete and unredacted version of Procedure No. 770 necessary to properly present this claim.

states. 42 U.S.C. § 1983. When these rights are violated, section 1983 creates an action for damages and injunctive relief for the benefit of "any citizen of the United States" against the state actor responsible for the violation. In accordance with the remedial nature of the statute, the coverage of section 1983 must be "liberally and beneficially construed." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 684 (1978)). The United States Supreme Court has, therefore, "given full effect to [the statute's] broad language" by recognizing that section 1983 provides a remedy "against all forms of official violation of federally protected rights." *Id.* at 444.

Mr. Cooper's allegations as described in full detail below raise violations of rights afforded to him by the Eighth and Fourteenth Amendments to the United States Constitution, provisions for which section 1983 provides a remedy. *See Farmer v. Brennan*, 511 U.S. 825 (1994); *Estelle v. Gamble*, 429 U.S. 97 (1976).

3. This Court Has Authority to Grant Injunctive Relief Under the Circumstances Raised in Mr. Cooper's Complaint

Under section 1983, a court may grant equitable relief for violations of the federal Constitution and laws. In the Ninth Circuit, a party seeking a preliminary injunction must meet one of two tests. Under the first test, a court may issue a preliminary injunction where it finds: (1) a substantial likelihood that plaintiff will prevail on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant; and (4) that granting the preliminary injunction will not disserve the public interest. *Martin v. International Olympic Comm.*, 740 F.2d 670, 674-75 (9th Cir. 1984) (citing *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 87 (9th Cir. 1975)). Under the second test, a court may issue a preliminary injunction if the moving party demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships tips heavily in the moving party's favor. *Martin*, 750 F.2d at 675. The purpose of a preliminary injunction is to preserve the *status quo* pending the outcome of litigation. *Regents of the Univ. of California v. ABC, Inc.*, 747 F.2d 511, 514 (1984).

a. An Injunction With Respect to Cooper's Lethal Injection Claims Is Proper

The legal standard for issuing a temporary restraining order is the same as the legal standard for issuing a preliminary injunction. *See Lockheed Missile & Space Co. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). Mr. Cooper has satisfied the preliminary injunction requirements on his lethal injection claim. There is a substantial likelihood that Mr. Cooper will prevail on the merits of his constitutional claim. Second, if the injunction is not granted, Mr. Cooper will suffer irreparable injury in that he will be executed before the merits of his claim are addressed. Third, the injunction will do no harm to the defendants because they will be free to execute Mr. Cooper at some future date should they prevail on the ultimate merits of the litigation. Fourth, the public interest will be served, rather than disserved, by meting out punishment in a manner consistent with the protections and procedures derived from the Constitution. Serious questions as to the constitutionality of lethal injection have been raised. Mr. Cooper will suffer the ultimate hardship, death, if the preliminary information is not granted pending resolution of his claim.

Absent injunctive relief, a decision finding the California lethal injection procedure unconstitutional would come too late to prevent Mr. Cooper from experiencing excruciating and unnecessary pain during the execution process. If the Court grants injunctive relief and ultimately resolves the claims against Mr. Cooper, the government will be free to reset the execution date. The preliminary injunction merely maintains the status quo and permits this Court to determine whether the State of California will subject Mr. Cooper to excruciating and unnecessary pain in the course of the execution. Under such circumstances, the Court has authority to grant the requested relief.

B. SUBJECTING MR. COOPER TO CALIFORNIA'S LETHAL INJECTION PROCEDURES VIOLATES HIS CONSTITUTIONAL RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660 (1962), protects against cruel and unusual punishment. U.S. Const., Amend. VIII. Such protection forbids the

infliction of unnecessary pain in carrying out a death sentence. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (Reed, J, opinion.); *Fierro*, 865 F. Supp. at 1413. Further, "[p]unishments are cruel when they involve . . . a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). A punishment is particularly constitutionally offensive if it involves *foreseeable* infliction of suffering. *Furman v. Georgia*, 408 U.S. 238, 273 (1973) (citing *Resweber*, 329 U.S. at 463) (concluding that had failed execution been intentional and not unforeseen, punishment would have been, like torture, "so degrading and indecent as to amount to a refusal to accord the criminal human status").

The United States Supreme Court, in determining whether a method of execution violates the Eighth Amendment prohibition against cruel and unusual punishment examines whether the method of execution: (1) comports with contemporary norms and standards of society; (2) offends the dignity of the person and society; (3) inflicts unnecessary physical pain; and (4) inflicts unnecessary psychological suffering. *See Weems v. United States*, 217 U.S. 349 (1910); *see also In re Kemmler*, 136 U.S. at 447 (punishment is unconstitutional if it inflicts "unnecessary pain, undue physical violence, or bodily mutilation and distortion"). Throughout this country's history, the courts have addressed different methods for carrying out the death penalty. Over the years, practices once found humane have later been declared unconstitutional.[3] Such evolution in the courts' opinions of execution methods is a reflection of the fact that the Eighth Amendment in its prohibition of cruel and unusual punishment has been interpreted in a "flexible and dynamic manner." *Gregg v. Georgia*, 428 U.S. 153, 171 (1976). As the Court consistently has recognized, the Eighth Amendment draws its meaning not from an inherent sense of right and wrong, but from "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Recently in California, a closer examination of execution by lethal gas led the

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[3] In the late 19th century, the United States Supreme Court cited drawing and quartering, as well as public dissection, as examples of unnecessary cruelty that violated the Eighth Amendment. *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879). A year later, the Court added burning at the stake, crucifixion, and breaking on the wheel to the list of unconstitutional methods of execution. *In re Kemmler*, 136 U.S. at 446.

Ninth Circuit to declare that method unconstitutional. *Fierro*, 865 F. Supp. 1387. Developed in 1937, the gas chamber was once viewed by society as a humane means of execution. Years of "history and moral development," however, changed that judgment. *Gomez v. United States District Court*, 503 U.S. 653, 654-55 (1992) (Stevens, J., dissenting.) As "the concepts of dignity and civility evolve, so too do the limits of what is considered cruel and unusual." *Fierro*, 865 F. Supp. at 1409. In the case of the gas chamber, much of the change in attitude came as a result of the use of cyanide gas in the Holocaust and the development of cyanide agents as chemical weapons. *Gomez*, 503 U.S. 653. Fundamentally, however, the change in public opinion came because of increased availability of information concerning the application of the method and a better understanding of the suffering inflicted upon condemned inmates. As with the gas chamber, a closer look at California's lethal injection procedures reveal similar constitutional infirmities.

The California Department of Correction's lethal injection protocol violates the Eighth Amendment because it will subject Mr. Cooper to an unreasonable and unacceptable risk of unnecessary physical and psychological pain and involves execution procedures that offend contemporary norms and standards of society. *See generally Atkins v. Virginia*, 536 U.S. 304 (2002) and cases cited therein; *see also California First Amendment Coalition v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002) ("To determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the 'initial procedures,' which are invasive, possibly painful and may give rise to serious complications.").[4]

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[4] Plaintiff submits as an Exhibit the transcript of the recent hearing conducted in the Tennessee capital case of *Abu Ali Abdur'Rahman v. Bredesen*, Tennessee Court of Appeals, Case No. M2003-01767-COA-R3-CV, Trial Transcript (hereinafter "TRT") and requests that this Court take judicial notice of this transcript. (Grele Decl. ¶ 6, Ex. E.) The question presented in that case was the constitutionality of the Tennessee Department of Corrections (hereinafter "TDOC") lethal injection procedures, which mirror those in California.

On June 2, 2003, the Tennessee Chancery Court entered a Memorandum and Order, making certain significant findings that support the position that the lethal injection procedures are unlawful. (Grele Decl. ¶ 7, Ex. F.) The Chancery Court's findings include the following: (a) "[t]he proof established that Tennessee's method [of lethal injection] is not state of the art. It was developed simply by copying the same method currently in use by some thirty other states. The method could be updated with second or third generation drugs to, for example, streamline the number of injections administered" (*id.*, Ex. F at 2); (b) "[m]oreover, the method's use of Pavulon,

1. **The Chemicals Used in the Lethal Injection Procedure Present a Risk of Unreasonable Suffering and Cruel and Unusual Punishment.**

The California Department of Correction's lethal injection "procedures" provide for the injection of three drugs in the following sequence: sodium pentothal, pancuronium bromide, and potassium chloride. The use of each of these drugs under the protocol creates serious risk of an inhumane execution. The second drug, pancuronium bromide, is the most problematic.

a. The Use of Pancuronium Bromide Is Inhumane

Pancuronium bromide, also known by its brand name Pavulon, paralyzes all voluntary muscles but does not affect sensation, consciousness, cognition, or the ability to feel pain and suffocation. (Declaration of Dr. Mark Heath filed herewith ["Heath Decl."] ¶ 8; Grele Decl. ¶ 6, Ex. E [TRT at 62-63, 111-12.]) Pancuronium bromide is a neuromuscular blocking agent. It operates by attaching to the receptor sites in skeletal muscle tissue to prevent or "block" nerve signals from interacting with the muscle tissue. (Grele Decl. ¶ 6, Ex. E [TRT at 54-55, 111-12].) It therefore renders the muscles unable to contract, but it does not affect the brain or nerves. (Heath Decl. ¶ 10.)

Thus, pancuronium bromide does not affect consciousness or the sensation of pain and suffering. It does not block the actual creation of the nerve impulse in the brain, and it does not block the passage of the nerve impulse through the nerve to the endpoint of the nerve fiber. (Grele Decl. ¶ 6, Ex. E [TRT at 56-57, 111-12.) It does not affect or diminish the patient's ability

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a drug outlawed in Tennessee for euthanasia of pets, is arbitrary. The State failed to demonstrate any need whatsoever for the injection of Pavulon" (*id.*); (c) "[s]ignificantly, there was no proof from the State that the Pavulon is necessary to the lethal injection process. No proof was provided by the State for the use of Pavulon in its lethal injection process. The state's expert, Dr. Levy, on cross-examination, testified that he did not know of any legitimate purpose for the use of Pavulon in the Tennessee lethal injection process. He agreed that the injection of Pavulon without anesthesia would be a horrifying experience" (*id.* at 6.); (d) "[b]ut the use of Pavulon is problematic because it is unnecessary. As stated above, the State failed to demonstrate any reason for its use. The record is devoid of proof that the Pavulon is needed. Thus, the Court concludes that, while not offensive in constitutional terms, the State's use of Pavulon is "gilding of the lily" or, stated in legal terms, arbitrary." (*Id.* at 13).

Despite these findings, the Chancery Court concluded that the Tennessee Department of Correction's lethal injection protocol does not offend the Constitution. The court based this conclusion principally on the contention that most death penalty states use a similar kind of lethal injection procedure. The decision currently is on appeal to the Tennessee Court of Appeals.

to think, to be oriented to where he is, to experience fear or terror, to feel pain, or to hear. All of those cognitive functions are left completely intact in the presence of pancuronium bromide. The only thing that is gone is the ability to move. (Grele Decl. ¶ 6, Ex. E [TRT at 112].)

While Pavulon does not affect the heart muscle, it does paralyze the diaphragm and the skeletal muscles in the chest. Accordingly, pancuronium bromide causes asphyxiation or suffocation. (Heath Decl. ¶ 13.)

If a person is not properly anesthetized when injected with pancuronium bromide, he will remain conscious while being completely paralyzed. In this state, the person will undergo the terrorizing and excruciating experience of suffocation without the ability to move or to express his pain and suffering. (Heath Decl. ¶¶ 10-11.) This experience is "worse than death." (Grele Decl. ¶ 6, Ex. E [TRT at 112-13, 120, 193-99] [where Carol Weihrer described her own experience of being paralyzed without adequate anesthesia. Ms. Weihrer was being ventilated and therefore did not experience the agony of suffocation].)

Pancuronium bromide paralyzes all skeletal muscles including facial muscles and the muscles used to speak and make noises. Thus, pancuronium bromide prevents observers from detecting any signs that the person is experiencing pain and suffering. (Heath Decl. ¶ 15.) The conscious paralyzed person will continue to have the desire to move without being able to do so. Carol Weihrer described the sensation of wanting to move without the ability to do so. "It was the most terrifying, torturous experience you can imagine because you cannot move. I was as alert at that time as I am right now . . . yet I could not alert the surgical team in any way that I was feeling everything. I was completely paralyzed. . . . I just remember using every ounce of my strength to try to move everything and realizing that they could not hear me or see me move anything." (Grele Decl. ¶ 6, Ex. E [TRT at 195-96].)

If administered alone, a lethal dose of pancuronium would not immediately cause a condemned inmate to lose consciousness. It would totally immobilize the inmate by paralyzing all voluntary muscles and the diaphragm , causing the inmate to suffocate to death while experiencing an intense, conscious desire to inhale. Ultimately, consciousness would be lost, but it would not be lost as an immediate and direct result of the pancuronium. Rather, the loss of con-

sciousness would be due to suffocation, and would be preceded by the torment and agony caused by suffocation. (Heath Decl. ¶ 13.)

As Dr. Geiser explained, the use of Pavulon can interfere with an anesthesiologist's ability to monitor the patient's condition and degree of unconsciousness. The use of a neuromuscular blocking agent requires "more expertise than in the normal anesthetic regimen." (Grele Decl. ¶ 6, Ex. E [TRT at 65-66].) Because of the skeletal muscle relaxation, the patient loses "some of the reflexes that you monitor in order to determine anesthetic depth." It "masks some of the physical parameters that we use to determine anesthetic depth." (*Id.*)

Dr. Heath makes the same point: anesthesiologists would never apply Pavulon or any neuromuscular blocking agent before confirming that the patient is properly anesthetized. "I would never give Pavulon without having a high degree of certainty that the patient were anesthetized with whatever drug I'm going to use to maintain the anesthesia." (Grele Decl. ¶ 6, Ex. E [TRT at 116].)

It is for these reasons that the use of a neuromuscular blocking agent in euthanasia of animals is strictly forbidden by the ethical standards for veterinary medicine. (*Id.* [TRT at 60-62.) The *1993 Report of the American Veterinary Medical Association (AVMA) Panel on Euthanasia* states:

> For death to be painless and distress-free, unconsciousness should precede loss of motor activity (muscle movement). This means that agents that induce muscle paralysis without unconsciousness are absolutely condemned as the sole agents for euthanasia.

(Grele Decl. ¶ 11, Ex. J.) This same Report later states:

> A combination of pentobarbital [a commonly used anesthetic and euthanasia agent] with a neuromuscular blocking agent is not an acceptable euthanasia agent.

The 2000 Report of the AVMA Panel on Euthanasia similarly condemns the use of neuromuscular blocking agents in euthanasia either as sole agents or in combination with an anesthetic. (Grele Decl. ¶ 12, Ex. K.) According to the Report: "A combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent." (*Id.* at 80.) Dr. Geiser explained there is no allowance under the AVMA standards for the use of Pavulon in euthanasia

under any set of circumstances. Perhaps the most insidious problem with pancuronium bromide is that it creates a chemical veil over the execution process in the following respects:

(a) First, by completely paralyzing the inmate, pancuronium bromide masks the normal physical parameters that an anesthesiologist or surgeon would rely upon to determine if a patient is completely unconscious and within a proper "surgical plane of anesthesia."

(b) Second, by completely paralyzing the prisoner, pancuronium bromide prevents observers (including the prisoner's attorney, the press, the victim's family members, the inmate's family members and representatives of the public) from seeing if the condemned prisoner is experiencing any pain or suffering from the lethal injection.

(c) Third, because pancuronium bromide is an invisible chemical veil and not a physical veil like a blanket or hood that is easily identifiable, the use of pancuronium bromide in lethal injection creates a double veil. It disguises the fact that there is a disguise.

The use of pancuronium in California's execution protocol effectively nullifies the ability of witnesses to discern whether the condemned prisoner is experiencing a peaceful or agonizing death. Regardless of the experience of the condemned prisoner, whether he or she is deeply unconscious or experiencing the excruciating pain of suffocation, paralysis, and potassium injection, he or she will appear to witnesses to be serene and peaceful due to the relaxation and immobilization of the facial and other skeletal muscles. (Heath Decl. ¶ 15; Declaration of Dr. Cory Weinstein ["Weinstein Decl."] ¶ 6(c).)

Under Procedure No. 770 here in California, if the process is performed without error or complication and if the proper dosages are administered, death is caused by the potassium chloride, not by the pancuronium bromide. (Grele ¶ 6, Ex. E [TRT at 118].) Pancuronium bromide does not affect consciousness, so it does not serve to make the process more humane. In fact, the use of pancuronium bromide creates the real and unreasonable risk of causing an excruciatingly inhumane execution when, for any number of reasons (explained below), the sodium pentothal fails to have its intended effect.

The problem with the use of pancuronium, and the risks attendant to its use, has resulted in revision of the New Jersey lethal injection protocol to omit its use entirely. (Heath

Decl. ¶ 9.) It is completely unnecessary to the process. (*Id.* ¶ 17.)

b. Sodium Pentothal Creates a Serious Risk of Inadequate Anesthesia

Sodium pentothal is the first drug of the sequence pursuant to Procedure No. 770. It is an "ultra short-acting" barbiturate. (Heath Decl. ¶ 18.) Its purpose in the procedure is to render the condemned inmate unconscious. (Grele Decl. ¶ 6, Ex. E [TRT at 291].) If the procedures are performed as intended, without any complications or errors, death would be caused by the third drug, potassium chloride, which would stop the functioning of the heart before the sodium pentothal would have its lethal effect. (*Id.* [TRT at 118].)

In medical practice, sodium pentothal is used only as an "induction" anesthetic. (*Id.* [TRT at 59-60].) It renders the patient unconscious very quickly, and its effect wears off in a matter of minutes. (*Id.* [TRT at 47].) There are very few drugs that have a shorter duration of action. (*Id.* [TRT at 107].) In surgery, the injection of sodium pentothal will be followed almost immediately, subject to the monitoring of the patient, with administration of another, longer-lasting anesthetic.

Dr. Heath explains that when anesthesiologists use sodium pentothal, they do so for the purposes of temporarily anesthetizing patients for sufficient time to intubate the trachea and institute mechanical support of ventilation and respiration. Once this has been achieved, additional drugs are administered to maintain a "surgical depth" or "surgical plane" of anesthesia (i.e., a level deep enough to ensure that a surgical patient feels no pain and is unconscious for the duration of the surgical procedure). The medical utility of the sodium pentothal derives from its ultra-short acting properties: if unanticipated obstacles hinder or prevent successful intubation, patients will quickly regain consciousness and will resume ventilation and respiration on their own. (Heath Decl. ¶¶ 19-20.)

Dr. Heath and Dr. Geiser both make clear that sodium pentothal would not be used to maintain the patient in a surgical plane of anesthesia for purposes of performing any kind of surgical procedure. (Heath Decl. ¶ 20.) Dr. Heath adds that it is unnecessary and risky to use a short-acting anesthesia in this fashion. (*Id.*)

Adding to the risk of inadequate anesthesia is the fact that sodium pentothal is very unstable. (Grele Decl. ¶ 6, Ex. E [TRT at 58, 109].) It is an unusual drug in that it comes from the manufacturer in powder form and must be mixed by the anesthesiologist into a solution (a fluid form) before use. (*Id.*) Sodium pentothal in solution has an extremely short shelf life and will begin to lose its potency within the initial 24 hour period after it is mixed. (*Id.*) Moreover, if the solution of sodium pentothal comes into contact with another chemical, such as pancuronium bromide, the mixture of the two will cause the sodium pentothal immediately to precipitate out of solution. (Heath Decl. ¶ 20.) Consequently, it is important to maintain the purity of the drug during administration. This explains the need for an injection of saline solution between the sodium pentothal and the pancuronium bromide. These factors are significant in the risk of the inmate not being properly anesthetized, especially since no one checks that the inmate is unconscious before the second drug is administered. (*Id.*)

Differences in a person's body composition (size, weight, and drug tolerance) and any medications he or she may have taken mean some prisoners may need a higher concentration of sodium pentothal than others to induce a loss of consciousness. (Heath Decl. ¶ 21; Weinstein Decl. ¶ 6(a).) California's failure to account for each inmate's physiological composition creates a high probability that the inmate will be conscious when the other chemicals are administered causing the inmate to suffer an excruciatingly painful death. There is a reasonable probability that some of the complications attendant to the execution of William Bonin were the result of this failure. (Heath Decl. ¶ 25.)

In addition, Procedure No. 770 allows for the inmate to ingest Valium prior to the administration of sodium pentothal. This is concerning because Valium is known to alter the sensitivity of the brain to sedative drugs such as and including sodium pentothal, which will significantly amplify the risk of inhumane pain and suffering should anything go wrong with the administration of the sodium pentothal. The failure of Procedure No. 770 properly to define the amount of Valium, or to consider the inmate's drug history in its administration, prior to the application of sodium pentothal is not a medically acceptable procedure and unnecessarily raises the risk that the inmate will suffer excruciating torment. (Heath Decl. ¶ 22.)

Procedure No. 770 calls for a five (5) gram dose of sodium pentothal administered in a single injection from a single syringe. By contrast, the original design of the lethal injection protocol called for the **continuous** intravenous administration of an ultrashort-acting barbiturate. The central elements of the lethal-injection procedure used in California is similar to the one adopted many years ago in Oklahoma (which, it appears, many states used as a model without substantive independent research). Oklahoma, however, requires the "continuous intravenous administration of an ultrashort-acting barbiturate." Oklahoma Statutes, Title 22 Criminal Procedure, Chapter 17 Part 1014 A. California's protocol eliminates this "continuous" requirement. The use of a continuous administration of the ultrashort-acting barbiturate is essential to ensure continued and sustained unconsciousness during the administration of pancuronium and potassium chloride. The failure to require a continuous infusion of sodium pentothal places the condemned inmate at a needless and significant risk for the conscious experience of paralysis during the excruciating pain of both suffocation and the intravenous injection of potassium chloride. (Heath Decl. ¶ 23.) Dr. Heath explains why potassium chloride would cause extreme pain if administered to a patient who is not properly anesthetized: "[I]t would be agonizing. Potassium activates all the nerve fibers inside the vein and the veins have many nerve fibers inside them. So it would basically deliver the maximum amount of pain the veins can deliver which is a lot." (Grele Decl. ¶ 6, Ex. E [TRT at 117].)

This risk has been realized in at least one, and possibly three California executions. The most recent of these, Stephen Anderson's, is graphically described in the Declaration of Margo Rocconi ("Rocconi Declaration"). (Grele Decl. ¶ 3, Ex. B.) The description strongly indicates that the sodium pentothal did not have the desired and necessary effect of sedating Mr. Anderson sufficiently. The intermittent and irregular heaving is consistent with the struggle to breathe in some state of consciousness. The length of this heaving and gasping is also highly unusual if the sodium pentothal is lethally administered as maintained by CDC. (Heath Decl. ¶ 24.) In the executions of William Bonin and Jatrun Siripongs, similar observations were made. (Grele Decl. ¶ 4, Ex. C.)

The ultimate risk with sodium pentothal is that an adequate dose of the drug will

not enter the inmate's bloodstream, thereby leaving the inmate conscious to experience suffocation from pancuronium bromide and cardiac arrest from potassium. Under defendants' procedures, this risk is present at several stages. First, contrary to regulatory requirements, Procedure No. 770 contains no provisions for how sodium pentothal or any of the drugs are to be handled, mixed, administered, stored, or accounted for. (Heath Decl. ¶ 27; Weinstein Decl. ¶¶ 3-7.) Second, for the reasons discussed above, both Dr. Geiser and Dr. Heath testified that they would never administer pancuronium bromide without first being certain that the patient (or inmate) is under a surgical plane of anesthesia. (Grele Decl. ¶ 6, Ex. E [TRT at 64-66, 116].) This requires some kind of monitoring after the administration of the anesthetic and before the injection of pancuronium bromide.

For all of the above reasons, a single dosage of sodium pentothal is not a proper anesthetic for use in lethal injection as described in the California procedure. Indeed, the AVMA standards for euthanasia make absolutely no provision for the use of sodium pentothal for any purpose in the euthanasia of animals. (*See id.* [TRT at 59-60, 71-73; *id.* ¶¶ 11, 12, Exs. J, K.) Dr. Geiser testified that he would not use sodium pentothal in euthanasia either by itself or in combination with any other drugs. (*Id.* ¶ 6, Ex. E [TRT at 59-60].)

c. The Lack of Sufficient Guidance in Procedure 770 Creates a Substantial Risk of Unnecessary Pain

The risk of inflicting severe and unnecessary pain and suffering upon Mr. Cooper in the lethal injection process is particularly grave in California because of the vague procedures and protocols in Procedure No. 770. These procedures and protocols fail to include safeguards regarding the manner in which the execution is to be carried out, fail to establish the minimum qualifications and expertise required of the personnel performing the crucial tasks in the lethal injection procedure, and fail to establish appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection procedures. Perhaps most importantly, there are no apparent answers to critical questions governing a number of crucial tasks and procedures in the lethal injection procedure such as:

- **The minimum qualifications and expertise required for the**

different personnel performing the tasks involved in the lethal injection procedure after the catheter is inserted;

- The methods for obtaining, storing, mixing, and appropriately labeling the drugs, the minimum qualifications and expertise required for the person who will determine the concentration and dosage of each drug to give, and the criteria that shall be used in exercising this discretion;

- The manner in which the IV tubing, three-way valve, saline solution and other apparatus shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;

- The manner in which the heart monitoring system shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;

- The manner in which the IV catheters shall be inserted into the condemned prisoner, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;

- The manner in which condition of the condemned prisoner will be monitored to confirm that proceeding to the next procedure would not inflict severe and unnecessary pain and suffering on the condemned prisoner;

Without guidance from medical professionals or providing sufficient guidance for carrying out lethal injection executions, Procedure No. 770 creates the unconstitutional risk of painful executions and botched procedures. (Heath Decl. ¶ 24-25.) This is not a speculative risk – it is demonstrated in the difficulties seen in 1996 during the Bonin execution and in 2002 during the Anderson execution.

Perhaps the most glaring failure of Procedure No. 770 is the failure to ensure adequate procedures regarding the administration of the drugs. There is no guidance or protocol that determines the timing of administration of these chemicals. (Heath Decl. ¶ 26.)

Procedure No. 770 fails to account for the individual inmate's differing body weights, tolerances anesthetics, allergic reactions, past exposure to alcohol and addictive drugs as

well as other factors, such as a condemned person's stress or fear during the execution and resultant release of adrenalin, some prisoners may require a higher dosage of sodium pentothal to lose consciousness in sufficient time to limit the pain and suffering experienced. (Weinstein Decl. ¶ 6(b).) The procedure actually contains elements such as Valium ingestion that can and will interfere with the ability of the sedative agent to render the inmate unconscious. (Heath Decl.¶ 22.)

The failure to ensure adequate application of the sedative drug can and is likely to cause extreme pain and suffering from both subsequent drugs. As Dr. Weinstein indicates, if the drugs are not administered properly or if the personnel are not adequately trained to administer the lethal substances serious consequences will follow. For example, if mistakes are made regarding the order in which the drugs are injected, the prisoner would suffer unnecessary and severe pain because he would not be properly anesthetized.

If Mr. Cooper is given sodium pentothal followed by pancuronium bromide and regains consciousness before the potassium chloride takes effect, he will be unable to move or communicate in any way while experiencing excruciating pain. As the potassium chloride is administered, he will experience an excruciating burning sensation in his vein, like the sensation of a hot poker being inserted into the arm and traveling up the arm and spreading across the chest until it reaches the heart, where it will cause the heart to stop. (Weinstein Decl. ¶ 6(c).)

If the sodium pentothal, pancuronium bromide and potassium chloride are administered in the sequence described and Mr. Cooper's heart fibrillates but does not stop, he will wake up but be unable to breathe. The initial dose of sodium pentothal could sensitize Mr. Cooper's pharynx, causing him to choke, gag, and vomit. He would be at risk of aspirating his vomitus or swallowing his tongue and suffocating. (*Id.* ¶ 6(a).)

Furthermore, the procedures provide for a saline injection between the pancuronium bromide and the potassium chloride. Although a saline flush is necessary between the first two drugs – the sodium pentothal and the pancuronium bromide – to avoid precipitation or crystallization of the pentothal, there is no need for a saline flush between the second and third drugs. This creates unnecessary complexity that increases the chance for error. (Grele Decl. ¶ 6, Ex. E [TRT at 129].)

The California CDC procedures provide for virtually no monitoring of the flow of the fluids into the prisoner's vein. (Weinstein Decl. ¶ 9.) Proper monitoring requires a clear view of the IV site and often will require "palpation" or touch of the site to check for skin temperature and firmness of the surrounding tissue. (Grele Decl. ¶ 6, Ex. E [TRT at 135-36].) Infiltration or some kind of diversion of the fluid away from the vein could occur without being detectable by the trained naked eye just through observation. (*Id.* [TRT at 136].) There is no indication that the executioner or the Warden, the persons present during the actual injection of the drugs, is trained in these areas; nor is there any indication that they perform any kind of monitoring other than crude visual observation.

Procedure 770 calls for a modification of the use of the "Y" site injection that is not medically approved, to the extent it can be determined. (Heath Decl. 29) In fact, the latering of established medical procedures, and the process for review and amendments of the protocol is another area of concern as it can lead to ad hoc administration and error. (Heath Decl. 30)

Further, there is no consideration of the need for modified procedures in 770 in the case of an emergency or difficulty. (Heath Decl. 32) Thus, it is likely that California will use a "cut-down" surgical procedure to open up Mr. Cooper in the event it cannot find a vein sufficient to administer these chemicals. The protocols don't even require medical training or experience in this gruesome procedure that is even more difficult and likely to result in error. (Heath Decl. 33)

Regardless of the manner in which "execution protocols" are drafted, the process of the lethal injection process, from start to finish, is complex and is fraught with the possibility of error, as all three recent wardens administering the protocol in California have admitted. (See Grele Decl. ¶¶ 8-10, Exs. G, H, and I.) The administration of a complex series of drugs by non-medical personnel has created numerous, and horrific, mistakes and errors in California and other states. (Heath Decl. ¶ 31; Grele Decl. ¶ 13, Ex. L.) These mistakes include "blow-outs," prison personnel spending almost two hours probing and sticking the condemned prisoner with various intravenous needles in efforts to start an IV catheter, improperly inserted catheters (no doubt attributable to the fact that, for ethical reasons, physicians are not involved in the process); kinks in the IV tubing or other problems restricting the rate at which the drugs flow into the con-

demned prisoner, and executions in which the condemned prisoner appeared to be conscious during the course of the execution and made unusual verbal noises or the condemned person's body jerked violently and moved against the restraint straps during the execution.

d. California Has Inflicted Excruciating and Unnecessary Pain in Previous Lethal Injection Executions

On February 23, 1996, William Bonin became the first person executed by means of lethal injection in California. It took the execution staff 27 minutes to insert the IV tube and begin administration of the lethal chemicals. (Grele Decl. ¶ 4, Ex. C.). The Bonin log notes heat sensitivity of the EKG monitor indicating a possible equipment problem. (Weinstein Decl. ¶ 8.) In addition, Bonin's records indicate irregularities in his heart and breathing monitoring. The records appear altered without appropriate verification, so they are difficult to interpret. Mr. Bonin may have been on medications for which the procedure did not account. (Heath Dec. ¶ 25; Grele Decl. ¶ 4, Ex. C.)

On February 9, 1999, Jaturun Siripongs, executed by lethal injection in California, was pronounced dead 15 minutes after being injected. According to prison officials, Siripongs declined to take a sedative, "an option offered to all condemned inmates in the moments before they die." After the injection of 50 cc of pancuronium bromide, "Siripongs' head tilted back and he opened his mouth widely, gasping for air and, to all appearances, yawning. His diaphragm continued to heave intermittently until near the end." (Grele Decl. ¶ 14, Ex. M.) (Michael Dougan, Eerie echoes rattle death chamber; Witnesses silent, but storm's fury shakes San Quentin, The San Francisco Examiner (February 9, 1999).) "Witnesses said his body twitched several times as the poisons worked through his body. At one point, his chest heaved and he seemed to gasp for air. His few more breaths were increasingly shallow until they stopped and he lay still." (*Id.*) (Larry D. Hatfield, Siripongs put to death; Pope's plea ignored as double-murderer lethally injected at San Quentin, The San Francisco Examiner (February 9, 1999).) A similar and graphic example of this was present for the Bonin execution.

e. California Most Recent Execution

On January 29, 2002, execution of Stephen Wayne Anderson took almost a half an

hour to complete. After the poisons began to enter Anderson's veins and he was rendered unconscious, "his stomach heaved up and down dozens of times for about four minutes before he died – unusual, because the chests of inmates being lethally injected typically heave once or twice, and then fall still." (*Id.*) (Kevin Fagan, Foes of execution criticize slow death / Proponents say that worry is unwarranted, The San Francisco Chronicle (January 30, 2002).) After the execution began, Anderson's eyes blinked repeatedly, and his right foot twitched. "His breathing became strained and heavy, his chest heaving every five or six seconds. The blood drained from his face, [and] his head rolled to the right. . . ." (*Id.*) (Scott Gold, The State Death Row Inmate Was Calm, Alone to End Execution: Stephen Wayne Anderson showed no anxiety, sought no comfort, officials say. He said his extensive prison writings would speak for him, LA Times, B7 (January 30, 2002).) (Grele Decl. ¶ 3, Ex. B.)

2. California Lethal Injection Procedures Do Not Comport With Contemporary Norms of Society.

If applied to animals, Procedure No. 770 would violate the AVMA standards for euthanasia in veterinary medicine, which are applicable throughout the country. Since 1981, at least nineteen states have enacted statutes that preclude the use of a sedative in conjunction with a neuromuscular blocking agent in the context of pet euthanasia.[5] In 2000, the leading professional association of veterinarians promulgated guidelines for euthanasia that preclude the practice. *2000 Report of the American Veterinarian Medical Association Panel on Euthanasia*, 218 Journal of the American Veterinary Medical Association ("AVMA"), 669, 680 (2001). The AVMA has also stressed that only trained personnel and those knowledgeable in anesthetic techniques should administer potassium chloride in conjunction with any anesthesia. *Id.* at 681. Indeed, the lethal injection protocol, in providing for the use of the neuromuscular blocking agent Pavulon, which is strictly prohibited for use in euthanizing non-livestock animals, violates California statutory and

[5] *See, e.g.*, Florida, Fla. Stat. §§ 828.058 and 828.065 (enacted 1984); Georgia, Ga. Code Ann. § 4-11-5.1 (enacted in 1990); Maine, Me. Rev. Sta. Ann., Tit. 17 § 1044 (enacted 1987); Maryland, Md. Code Ann., Criminal Law § 10-611 (enacted 2002); Massachusetts, Mass. Gen. Laws § 140:151A (enacted in 1985); New Jersey, N.J.S.A. § 4:22-19.3 (enacted in 1987); New York, N.Y. Agric. & Mkts. § 374 (enacted in 1987); Oklahoma, Okla. Stat., Tit. 4, § 501 (enacted in 1981); Tennessee, Tenn. Code Ann. § 44-17-303 (enacted in 2001).

regulatory law prohibiting cruelty to animals. *See* Cal. Penal Code §§ 597 and 599b; Bus. & Prof. Code §§ 4800-4917 (the Veterinary Medicine Practice Act); Office of the Attorney General of the State of California, Opinion 01-103 (January 2, 2002)) (adopting the *1993 Report of the American Veterinary Medical Association Panel of Euthanasia* as the proper standard in California for measuring whether an animal euthanasia procedure causes "unnecessary or unjustifiable physical pain or suffering" within the meaning of Penal Code Section 599b).

Under any view, our "evolving standards of decency" require that execution procedures conform at least to the contemporary norms and standards for the treatment of animals. The question of what might constitute minimal contemporary standards of decency also must be considered in light of the availability of alternatives. With little effort, defendants can develop a safe, simple, and properly regulated protocol that would involve a single injection of pentobarbital, the most commonly used method in the euthanasia of domesticated animals. *See* Bus. & Prof. Code § 4827(d).

The United States Supreme Court has made clear that the principle of human dignity is central to the Eighth Amendment cruel and unusual punishments clause, and that this principle of dignity goes beyond the mere infliction of physical pain or suffering. Human dignity can be offended in unconstitutional ways through unacceptable stigmatization of an inmate or through other means that may not involve excessive pain or suffering. In the seminal case of *Furman*, 408 U.S. 238, Justice Brennan explained this principle as follows:

> The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity . . . .
>
> The primary principle [behind the Eighth Amendment] is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment . . . . Yet the Framers also knew "that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." [citing *Weems v. United States*]. Even though "[t]here may be involved no physical mistreatment, no primitive torture," *Trop v. Dulles*, [], 356 U.S. at 101, 78 S.Ct. at 598, severe mental pain may be inherent in the infliction of a particular punishment. See *Weems v. United States, supra*, 217 U.S. at 366 . . . . The true significance of [a variety of cruel and unusual punishments] is that they treat members of the human race as nonhumans, as objects to be toyed

with and discarded.

408 U.S. at 271-73, 92 S.Ct. at 2742-43.

IV. CONCLUSION

Kevin Cooper, through this action, does not seek to overturn his conviction and sentence. By its terms, he is demanding the protection of the civil rights to which he is entitled under the law. While the enforcement and punishment of criminal acts is undisputedly an important and legitimate public concern, such goals must be achieved in a manner consistent with the protections and procedures derived from the Constitution. To avoid the risk that Cooper's execution will result in needless suffering and pain, thereby denying him the protection afforded under the Eighth and Fourteenth Amendments to the Constitution, he is entitled to redress under 42 U.S.C. Section 1983. Accordingly, Cooper requests that the Court issue a temporary, preliminary, and permanent injunction preventing defendants from executing him by means of lethal injection, under the method and the procedures currently in effect in the State of California.

Dated: February 1, 2004.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DONALD J. BEARDSLEE,

Plaintiff,

v.

JEANNE WOODFORD, Director of the California Department of Corrections; JILL L. BROWN, Acting Warden, San Quentin State Prison, San Quentin, CA and DOES 1-50;

Defendants.

Case No. C 04-5381 (JF)

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER; PRELIMINARY INJUNCTION, AND ORDER TO SHOW CAUSE

Hearing Date: January 6, 2005
Time: 10:30 a.m.
Courtroom: 3

EXECUTION DATE SET

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I. PLAINTIFF IS ENTITLED TO PRELIMINARY RELIEF TO PURSUE HIS EIGHTH AMENDMENT CLAIM ON THE MERITS

A. Plaintiff Has Not Unduly Delayed In Filing This Action.

Notwithstanding the fact that Plaintiff exhausted his administrative remedies and sought to have this motion heard on December 23, 2004, Defendants argue that Plaintiff has unduly delayed in bringing this lawsuit. The point is meritless. Unlike Kevin Cooper, Plaintiff did not file his action just eight days before his scheduled execution. Indeed, rather than wait until the last minute, Plaintiff filed it—fully exhausted—while he still had a viable avenue of relief pending, the Ninth Circuit having granted a motion to expand the certificate of appealability in Plaintiff's federal habeas case.[1]

Plaintiff acknowledges that this Court found that Kevin Cooper could have brought an Eighth Amendment challenge to California's lethal injection procedure years earlier than he did. *Cooper v. Rimmer* 2004 U.S. Dist. LEXIS 1624 (N.D.Cal. February 6, 2004) ("*Cooper I*") Plaintiff respectfully urges this Court to reconsider its view of the matter. First, this Court, in *Cooper v. Woodford*, No. C 04 436 JF (October 14, 2004) held that Petitioner was required to exhaust administrative remedies, which Plaintiff has done. It is unclear whether Plaintiff could have done so earlier as the Department of Corrections does not permit challenges to "anticipated action[s]." 15 CCR § 3084.3(c)(3). This would logically restrict Plaintiff from filing any administrative challenge before his appeals had been exhausted and the state was able to move forward with setting an execution date.

Furthermore, under *Fierro v. Terhune,* 147 F.3d 1158 (9th Cir. 1998), a plaintiff lacks standing to challenge a method of execution under 42 U.S.C. § 1983 until after an execution date is set

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[1] The panel requested briefing on the merits and heard oral argument in Pasadena on December 28, 2004.

and he is given the opportunity to choose his execution method under California Penal Code § 3604(b).

It would not have made sense for Plaintiff (or Cooper) to bring this litigation years ago. Penal Code § 3604(a) provides in pertinent part that the inmate's death shall be caused "by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." The Department's standards, of course, can change over time. Plaintiff's challenge is being brought under the June 2003 revision of Procedure 770, *which is not made available to death row inmates*. It makes no sense to require an inmate to bring suit until he has a sense of how the state is going to put him to death.[2]

Because William Bonin, the first man to die by lethal injection, was not executed until February 1996, Plaintiff could not have made as strong a showing on the merits years ago as he can today with the data he has gathered from intervening executions. Indeed, this Court in *Cooper* cited a number of cases where lethal injection challenges were rejected because the plaintiff did not present evidence of problems that had occurred in executions conducted by the state that sentenced him. As Dr. Heath states, much of Plaintiff's evidence was not available at the time *Cooper* was being litigated, and much of it was unavailable to Plaintiff until just weeks ago. Additionally, given that the Eighth Amendment inquiry focuses in part on "evolving standards of decency[,]" *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), there is no reason to require a condemned man to bring an Eighth Amendment challenge as soon as he is sentenced.[3] *See, e.g., Atkins v. Virginia*, 536 U.S. 304 (2002) (reversing prior holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989) to hold that the Eighth Amendment forbids execution of the mentally retarded because of the developments over 13 years regarding the national

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[2] It is arguably no more than a "sense" given how much critical information is omitted from Procedure 770, information that Defendants have refused to turn over without a court order.

[3] Plaintiff doubts that Defendants would agree to litigate such claims over and over early in the capital appeals process, risking an adverse finding in the process. Defendants would surely argue that such claims are not ripe for decision. *Cf. Campbell v. Wood*, 18 F.3d 662, 680-81 (9th Cir. 1994) (Washington defendants unsuccessfully argued that Eighth Amendment habeas challenge to default execution method of hanging was not ripe because inmate ultimately could choose lethal gas).

consensus of executing retarded prisoners). Were in inmate to lose such a claim early on, nothing would stop him from bringing it again when his execution loomed in light of intervening changes in societal attitudes.

Looked at another way, it is inconceivable that this Court would certify this litigation as a class action for injunctive relief under Federal Rule of Civil Procedure 23(b)(2) with Plaintiff as the class representative. The class would necessarily include inmates who might not be executed for 20 years. Their executions could be conducted under a different protocol with different chemicals and in a societal environment that might have evolved in their favor. An adverse judgment now almost certainly would have no preclusive effect. Similarly, had William Bonin filed an action in the early 1990s seeking to represent a class that included Plaintiff, the suit could not have proceeded for the same reasons. If Plaintiff could not have been bound by an Eighth Amendment class action filed in the mid-1990s, there is no reason to say he should have pursued such a claim on his own at that time.

Defendants evince no concern for the resources of this Court. This Court dismissed Kevin Cooper's claims so that he could exhaust administratively. Plaintiff assumes that since Cooper still has potentially meritorious DNA claims for substantive relief pending, this Court is not anxious to have Cooper's lethal injection case—or hundreds of others—on its docket any time soon. This Court should hold that the timing of this lawsuit does not weigh against the granting of an injunction.

B. Plaintiff's Eighth Amendment Claim is Properly Brought in This Proceeding.

In this Circuit, challenges to a method of execution are properly considered as section 1983 claims. *Fierro v. Gomez*, 77 F.3d 301, 306 (9th Cir. 1996), *opinion vacated on other grounds*, 519 U.S. 918 (1996). As this Court recognized in *Cooper I*, it is bound by the determination in *Fierro* in the absence of Supreme Court authority to the contrary, which Defendants concede is lacking.

Defendants argue that since Plaintiff, taking the shotgun approach that the harsh rules

against successor petitions require, attempted to preserve an Eighth Amendment claim that could not be supported at the time it was pleaded that the section 1983 action is barred. Defendants do not raise this point with respect to Plaintiff's First Amendment claim. Defendants are wrong with respect to Plaintiff's Eighth Amendment claim.

Arguing 28 U.S.C. § 2244(b) only shows why this claim is properly brought as a section 1983 action. Section 2244(b) authorizes successor petitions based on newly discovered evidence only if the evidence goes to guilt or innocence. Obviously, that is not at issue here. Further, Judge Armstrong did not rule on Plaintiff's lethal injection claim. In *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), the U.S. Supreme Court held that a claim is not barred by 2244(b) as successive when it was dismissed without prejudice in the first petition; in the context of section 2255 motions, the Second Circuit held that a claim is not barred as successive when it was not litigated to conclusion. *Ching v. United States*, 298 F.3d 174 (2nd Cir. 2002). There is no bar to proceeding.

C. Neither *Cooper* Nor Any Of The Cases Cited Therein Control This Case.

Defendants also attempt to nip this case in the bud by arguing that this Court and the Ninth Circuit have previously upheld California's lethal injection procedure against Eighth Amendment challenges. That is not true. The constitutionality of California's lethal injection procedure has never been subjected to a full trial on the merits like Washington's hanging protocol was. *See Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994).

This Court denied Cooper preliminary relief, and the Ninth Circuit affirmed. *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004) ("*Cooper II*"). In his concurrence, Judge Browning emphasized that the Ninth Circuit's affirmance was not a decision on the merits

> "Appellate review of the grant or denial of preliminary injunctive relief requires consideration of the merits of the underlying issue, but it does not decide them. . . . We review for abuse of discretion the district court's decision to grant or deny a preliminary injunction or temporary restraining

> order. . . . 'Our review is limited and deferential.' . . . We determine only whether 'the district court employed the appropriate legal standards governing the issuance of a preliminary injunction, and correctly apprehended the law with respect to the issues underlying the litigation.' . . . Our review of the district court's merits decision -- if it is appealed -- will be more rigorous. . . . Neither the district court nor the parties should read today's decision as more than a preliminary assessment of the merits." *Id.* at 1033-34, Browning, J., concurring.

Thus, this Court is not bound by the Ninth Circuit's decision in the Cooper case.

In Cooper, the Ninth Circuit observed, "We have previously upheld the constitutionality of lethal injection as a method of execution" in two Arizona cases. *Cooper II* at 1033.[4] Because those decisions were not reached on comparable records, neither *LaGrand v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998) nor *Poland v. Stewart*, 117 F.3d 1094, 1104-05 (9th Cir. 1997) dictates the outcome here. In *Poland*, the inmate had submitted evidence of problems that had occurred in other states, all of which "involved either problems in finding a suitable vein or violent reactions to the drugs." *Poland v. Stewart*, 117 F.3d at 1105. The Ninth Circuit deemed it significant that Poland did not submit evidence of problems that had occurred using Arizona's protocol. "We know from proceedings before this court that there have been several executions in Arizona which have utilized lethal injection as the method of execution. *Since Poland has submitted no contrary evidence, we assume that no problems were encountered.*" *Ibid.*, emphasis added. Plaintiff has submitted evidence about *California executions* that, according to Plaintiff's expert, shows that California's execution procedure does not render inmates unconscious. Further, Poland did not challenge the use of pancuronium bromide to cause death by asphyxiation as an Eighth Amendment violation.

In *LaGrand*, the district court rejected an Eighth Amendment challenge as speculative

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[4] This Court recognized that *Poland* and *LaGrand* contain no more than general approval of lethal injection since it distinguished these cases from cases out of Connecticut and Florida where, in this Court's view, the state courts "held on a fully-developed record that such protocols are constitutional." *Cooper I* at * 9, citing *State v. Webb*, 252 Conn. 128, *cert. denied*, 531 U.S. 835 (2000); *Sims v. State*, 754 So.2d 657 (Fla.), *cert. denied*, 528 U.S. 1183 (2000).

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in light of the evidence. "The eyewitness reports of the executions of the two Arizona inmates who have been executed by this method support the finding that the condemned lose consciousness within seconds, and death occurs with minimal pain within one to two minutes." *LaGrand v. Stewart*, 883 F. Supp. 469, 470-71 (D.Ariz.1995). The Ninth Circuit affirmed. As in *Poland*, it held that none of the problematic executions involved Arizona. *LaGrand v. Stewart*, 133 F.3d 1253, 1264-65 (9th Cir. 1998). Again, plaintiff's case is different, and, again, LaGrand did not challenge the use of pancuronium bromide to cause death by asphyxiation as an Eighth Amendment violation.

None of the state court cases cited by this Court in the Cooper case are persuasive. The California Supreme Court opinion in *People v. Snow*, 30 Cal. 4th 43, cert. denied, 124 S. Ct. 922 (2003) is not persuasive. *Snow* dismissed a lethal injection challenge in a sentence as "noncognizable on appeal and lacking merit." *Id.* at 127-28. For the proposition that such claims lack merit, *Snow* cited *People v. Holt* (1997) 15 Cal.4th 619 (1997), another direct appeal case, which had dismissed an Eighth Amendment challenge in a sentence as "based on anecdotal evidence of the administration of lethal injection in other states[.]" *People v. Holt*, 15 Cal. 4th at 702. Again, Plaintiff's case is different.

The Connecticut opinion in *Webb*, cited by this Court, does not dictate the result here because it dealt with a very different factual record. Most of the defense evidence put on at the Connecticut hearing concerned research into the procedure and the training of personnel, matters on which Procedure 770 is silent and about which Defendants have refused to provide Plaintiff with information. *Webb* also does not control because the facts set out in the opinion suggest that Connecticut takes greater care to minimize the possibility of human error than California does.[5]

According to *Webb*, Connecticut uses a manifold system, not a syringe system like California.

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[5] Plaintiff takes no position on the constitutionality of Connecticut's lethal injection procedures.

> "[S]tate officials conferred with officials of at least six other states that employed lethal injection. The state ultimately selected a manifold system for the administration of the agents. Although other states utilize a manual process, which requires that each chemical agent be administered individually through separate syringes, the task force selected the manifold system because that system minimized the potential for problems associated with the administration of the agents. The manifold locks the agents in a particular order and, as a result, eliminates the risk of inserting a syringe in an improper sequence. [Corrections Commissioner] Matos also described the type of catheter selected by the state, which was designed and intended for delivering fluids sequentially and rapidly." *State v. Webb*, 252 Conn. at 134.[6]

In addition to this safeguard, Connecticut provided for professional oversight at certain critical stages. Intravenous lines would be established by "[a] person or persons, properly trained to the satisfaction of a Connecticut licensed and practicing physician[.]" *Ibid.*. No such requirement appears in California's Procedure 770. A psychologist "screened department employees who would participate in the procedure[.]" *Id.* at 133. Again, no such safeguard appears in Procedure 770. The Court in *Webb* relied on the training standards and the use of the manifold system in rejecting the defendant's argument that the procedure entailed serious risks of malfunctioning. *Id.* at 142-44. Thus, *Webb* cannot be used to defend Procedure 770.

Plaintiff here has made a much stronger showing than the defendant in *Webb*. Connecticut apparently had not conducted any executions under its protocol at the time it decided *Webb*. *Id.* at 131-33. Notably absent from *Webb* is any discussion of troubling data from other executions conducted using the manifold—or any other—system or protocol. Thus, *Webb* spoke of being unable to eliminate the risk of accident without any useful context. Further, *Webb*, like *Cooper*, *Poland* and *LaGrand*, did not consider whether asphyxiation caused by the administration of pancuronium bromide is in itself an Eighth Amendment violation. *Webb* does not control.

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[6] It would be interesting to discover whether or not Connecticut conferred with California officials before deciding to use the manifold process rather than syringes.

Sims v. State of Florida, 754 So.2d 657 (Fla.2000) also is not persuasive. *Sims* was decided on February 16, 2000; the lethal injection law had only gone into effect on January 14, 2000. *Sims*, 754 So.2d at 664. Thus, as in *Webb*, Florida had not yet conducted any executions using the lethal injection procedure that the State Supreme Court upheld. Again, that is not the case in California.

Apart from its reliance on questionable authority, the decisions of this Court and the Ninth Circuit in the Cooper case are distinguishable for other reasons. In discussing the propriety of administering the paralyzing neurotoxin pancuronium bromide (Pavulon), this Court ruled:

> "Nor has Plaintiff met his burden of showing that the use of Pavulon is inhumane and unnecessary. According to Defendants and their experts, a principal purpose of Pavulon is to stop an inmate's breathing. Plaintiff has not articulated a compelling argument that this is not a legitimate state interest in the context of an execution." *Cooper I* at *9.

Plaintiff has articulated a compelling argument here: that causing death by asphyxiation is in itself cruel and unusual punishment under the authority of *Campbell v. Wood*, 18 F.3d 662, 684, 687 & n.17 (9th Cir. 1994) and *Fierro v. Gomez*, 77 F.3d 301, 308 (9th Cir. 1996), *opinion vacated on other grounds*, 519 U.S. 918 (1996). This constitutional concern trumps any theoretical interest the state has in stopping the condemned man's breathing. Defendants do not argue to the contrary.

Kevin Cooper did not make this legal argument, either in his complaint or motion papers. Additionally, Cooper's papers focused only on the log from the Bonin execution and the double dose of pancuronium bromide; he did not focus on how the data on the logs strongly suggest that the inmates were conscious throughout the procedure. Thus, plaintiff has made a much stronger showing, factually and legally, than Cooper did, and this Court should judge his case accordingly.

The Ninth Circuit made several observations in *Cooper* that do not withstand scrutiny. Citing Campbell, the Court stated that "[t]he risk of accident cannot and need not be eliminated from

the execution process in order to survive constitutional review." *Cooper II* at 1033. Washington had conducted one apparently "successful" hanging under the challenged protocol at the time *Campbell* was decided. *Campbell v. Wood*, 18 F.3d at 685. Connecticut had not conducted any lethal injections under its protocol at the time its supreme court observed in *Webb* that the risk of accident cannot be eliminated, nor had Florida when *Sims* held that the risks to the condemned were minimal. Platitudes about the risk of accident are appropriate to the essentially facial challenges presented by these cases, but they are not appropriate in the face of the high percentage of "accidents" that have been documented in California. When the number of "accidents" reaches the level that it has in California, the inherent reliability—and constitutionality—of the procedure must be called into question.

The Ninth Circuit observed in *Cooper* that "[e]xecution by lethal injection is now used by 37 of the 38 states with the death penalty, objectively indicating a national consensus." *Cooper II* at 1033. This obligation conflicts with *Campbell*, where the Ninth Circuit refused to condemn hanging as a method of execution because most states had discontinued it. "The number of states using hanging is evidence of public perception, *but sheds no light on the actual pain that may or may not attend the practice*. We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice." *Campbell v. Wood*, 18 F.3d at 682. It follows that the nationwide adoption of some form of lethal injection process does not prove that California's procedure is constitutional. As this Court correctly recognized, "Punishments involving "torture or a lingering death" violate the Eighth Amendment . . . and when analyzing a particular method of execution, it is appropriate to focus 'on the objective evidence of the pain involved[.]'" *Cooper I* at *6, citations omitted. Broadly stated, there can be no national consensus on torture.

D. Plaintiff's Evidence Entitles Him to Preliminary Relief.

Defendants' argument that Plaintiff has not cast doubt on the reliability of the lethal

injection process lacks merit. Plaintiff has shown that the logs from several executions in California, most notably those of William Bonin, Manuel Babbit, Jaturun Siripongs, and Stephen Wayne Anderson, suggest that the condemned men were not properly sedated prior to being injected with potassium chloride and that they likely suffered an excruciatingly painful death. Plaintiff has also come forward with information contained in toxicology and autopsy reports from prisoners executed by lethal injection in other states, which shows that there is a significant likelihood that Mr. Beardslee will be conscious during his execution and experience tremendous pain as a result.

Citing *Reid v. Johnson*, 333 F. Supp. 2d 543 (D.Va. 2004), Defendants argue that the toxicology reports are not probative without more information about when and how they were conducted. This is remarkable given that it was their expert in *Cooper*, Dr. Dershwitz, who first suggested, without elaboration, that thiopental levels in blood were relevant.

> "From my pharmacokinetic analysis I have generated a graph, attached as Exhibit B. This pharmacokinetic graph shows the concentration of thiopental in the blood in an average man as a function of time . . . From my pharmacodynamic analysis, I have generated a graph, attached as Exhibit C. This pharmacodynamic graph shows the probability that an average man will be conscious as a function of the blood concentration of thiopental. In other words, the graph shows the likelihood of consciousness in the presence of varying blood concentrations of thiopental." (Exhibit R-3, Dershwitz Declaration from *Cooper*.)

Defendants conveniently ignore that when Dr. Dershwitz was informed of Kentucky inmate Edward Harper's thiopental levels as revealed in his post-mortem toxicology reports, he called this evidence "potentially troubling," noting that "the blood level should be a lot higher[.]" mg/l. (Exhibit O-3, "On Death Row, a Battle over the Fatal Cocktail", by Adam Liptak, NEW YORK TIMES, August 16, 2004). Presumably, if Defendants and Dr. Dershwitz had something to say about the methodology of analyzing thiopental levels, he would have said it in *Cooper*, and he would say it here.

Defendants ignore that the Kentucky data in the Harper case, which Dr. Dershwitz found troubling, shows the levels in blood drawn from three different parts of the body. (Exh. F-2, F-12-14, Kentucky logs.) The North Carolina documents show what day the blood was collected. (Exh. H-2, 4, 5A, 7, North Carolina Toxicology Reports.) The Arizona documents show "troubling" cases where the blood was drawn right after the execution (Exh. U-14, 26 (Brewer execution)) and the morning after the execution (Exh. U-19, 88 (Ceja execution)). Additionally, in many of the Arizona reports, the DOCTORS performing the toxicology screens from MedTox state: "Pentobarbital concentrations[8] as high as 50 mg/ml may be required to induce therapeutic coma, apparently suggesting concern that the blood levels were too low. (Exh. U-4, 18, 19, 22-Arizona Reports.) It is noteworthy that Arizona, apparently, uses the SAME amount of thiopental—5 grams—as California, yet, in numerous cases, little if any thiopental was detected in the blood. (Exhs. U-4, 14, 16, 18, 19, 22, Arizona Toxicology Reports.)

Defendants also ignore the essence of Plaintiff's complaint: the complete lack of safeguards to ensure that the procedure functions as intended and the lack of assurances that appropriately trained and screened people are conducting the execution. Given the testimony in *Webb* about physician-supervised training and psychologically screened personnel, these are clearly areas that cry out for further inquiry, particularly in light of the documented history of problems in California executions.

Plaintiff has made as substantial a showing as possible given the information available to him. As detailed in Plaintiff's discovery motion, Plaintiff sent defendant Warden a detailed letter asking her to provide Plaintiff's counsel with this information about the process. The Attorney General, however, has taken the position that nothing related to the execution process is discoverable,

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[8] The reports state that thiopental metabolizes to pentobarbital.

and nothing would be produced without a court order. Plaintiff reiterates that he has more than made his case for an injunction. However, Defendants should not be allowed to argue that there are holes in Plaintiff's proof when Defendants have taken such pains to shield the particulars of the lethal injection process from public scrutiny. The motion should be granted.

II. PLAINTIFF IS ENTITLED TO PRELIMINARY RELIEF TO PURSUE HIS FIRST AMENDMENT CLAIM ON THE MERITS

The omissions in defendants' opposing papers are significant. Defendants do not apply the test set out in *Turner v. Saffley*, 482 U.S. 78 (1987), and they do not apply the test for a preliminary injunction except to imply that they will be prejudiced if they cannot execute Plaintiff sooner rather than later. Defendants do not contend that under Procedure 770, pancuronium bromide is the agent that causes death, or that administering it has any legitimate penological interest. Such an argument would fail given that this Circuit deems causing death by asphyxiation to be cruel and unusual punishment, another proposition defendants do not dispute. Defendants do not contest the linkage between the First Amendment, Eighth Amendment and the development of execution policy in general that underlay the decisions in *California First Amendment Coalition v. Woodford*, 2000 U.S. Dist. LEXIS 22189 (N.D. Cal. July 26, 2000) and *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) (collectively, "the *First Amendment Coalition* case"). Finally, defendants do not dispute the finding from the *First Amendment Coalition* case that their execution policies are motivated by a desire to conceal the reality of the process from the public in order to stifle debate.

Rather than engage seriously with this claim, defendants advance two meritless propositions. First, Defendants demean the notion that the First Amendment rights of a man about to be executed deserve respect, calling this claim "make weight." (Opp. at 7.) Second, consistent with

their response to Plaintiff's Eighth Amendment claim, Defendants assert that the administration of pancuronium bromide will not violate any rights Plaintiff might have because he will have nothing to communicate or complain about, because the anesthetizing procedure, most of which remains shrouded in mystery, will go off without a hitch. Neither of Defendants' contentions has merit.

This Court and the Ninth Circuit have given due consideration to First Amendment claims brought prior to execution. Shortly before Darrell Rich was executed, he filed an action challenging the prison's refusal to provide him with a sweat lodge to conduct a purification ritual prior to his execution, a ritual considered essential to his Native American beliefs. *Rich v. Woodford*, 210 F.3d 961, 963 (9th Cir. 2000) (Reinhardt, J., dissenting from denial of rehearing *en banc*). He lost. However, he did not lose because the idea of a First Amendment claim by a man about to be executed is silly. Rather, the district court denied Rich's claim by applying the Turner factors in light of the state's alleged security concerns. Id. at 963.[11]

Of course, while the courts may have taken Rich's claim seriously, defendants did not. As Judge Reinhardt noted,

> "In its brief to this court, however, the state exhibited a bizarre attitude toward the subject of religion in general and Native Americans' beliefs in particular. The California Attorney General's office argued that the religious beliefs the condemned man adhered to were "incapable of either proof or refutation," and "secular authorities, such as the prison Warden, cannot be required, on faith, to accept risks to prison security and the personal safety of others, in order to satisfy *these kinds* of belief" Id. at

[11] The dissenting Ninth Circuit judges in the Rich case pointed out that defendants had fabricated the alleged security concerns that the district court relied on. Id. at 963-64 (noting "transparent weakness of the state's purported concerns and summarizing evidence shown to be false); id. at 965 (Kozinski, J., dissenting from denial of rehearing *en banc*) (stating that constitutional rights of prisoner who "amply deserved to die" should be respected "where doing so will not impair serious governmental interests[,]"noting that state had made "no credible showing that its interests would be impaired" and opining that "the arguments contrived by the Attorney General to defeat Rich's request cast doubt on the professional candor of the lawyers who presented them;" id. at 965-66 (Wardlaw, J., dissenting from denial of rehearing *en banc*) (expressing concern "as to the State's representations to the Court" and stating that the Court "should be able to apply the "reasonableness" analysis required by *Turner* . . . with confidence in the information we have been provided."

962-63, footnotes omitted, emphasis in original.

The same dismissive attitude is on display here. It should not distract this Court from confronting the factual and legal issues square on.

Touching the merits, defendants argue that pancuronium bromide cannot and will not invade Plaintiff's First Amendment rights because he will, guaranteed, be rendered unconscious by the sodium thiopental. Obviously, Plaintiff disagrees. In the First Amendment context, however, the probable reliability of the process is not dispositive. Defendants do not rule out the possibility that the process could malfunction, that Plaintiff would not be rendered unconscious, and that he would experience torturous pain from the potassium chloride. (Opp. at 7.) Defendants would characterize such an occurrence as an "accident," rather than an Eighth Amendment violation. Whatever it is, Plaintiff has a First Amendment right to communicate about what happened. Pursuant to the policies articulated in the *First Amendment Coalition* case, he has the right to impart information about his experience that would help the legislative and executive decision makers evaluate whether, constitutional or not, executions in California should continue to be carried out under the current protocol, and he has the right to contribute to the public debate on this issue. Defendants' position must be seen for what it is: an attempt to restrict the flow of information in order to stifle debate.

In their papers, Defendants have expressly or impliedly conceded everything necessary under *Turner* for this Court to grant *permanent* relief, not just preliminary relief, against the administration of pancuronium bromide: 1) that Plaintiff has a First Amendment right to communicate information about his execution experience, 2) that the prevention of speech effected by pancuronium bromide is not content neutral, 3) that administering pancuronium bromide serves no legitimate penological goal, 4) that Plaintiff has no alternative means of exercising his rights, 5) that eliminating pancuronium bromide will have no impact on the institution, and 6) that available alternatives to the

impermissible goal of denying Plaintiff his First Amendment rights are not at issue.

Having expressly or impliedly conceded every prong of *Turner*, defendants have conceded probable success on the merits. Defendants do not dispute that Plaintiff will suffer irreparable harm or that, in light of the *First Amendment Coalition* case, the right to be vindicated serves the public interest. To the extent they argue anything, it is only that vindicating Plaintiff's rights will delay (not prevent) his execution. Any delay is their fault. Defendants would not now be litigating a First Amendment claim in federal court if they had granted Plaintiff's request administratively. Their failure to do so in light of their abundant concessions should convince this Court that pancuronium bromide is administered for an improper purpose. The balance of hardships clearly favors plaintiff. The request for an injunction should be granted.

III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for preliminary relief should be granted.

DATED: December 30, 2004

Respectfully submitted:

s/Steven S. Lubliner
Steven S. Lubliner
Attorney for Donald Beardslee